

NATIONAL BISCUIT COMPANY

TRADE MARK LITIGATION

Opinions, Orders, Injunctions and Decrees
Relating to Unfair Competition and
Infringement of Trade Marks

Fifth Edition

1915



Class T 223

Book N 4 B 6

PRESENTED BY 1915

U.S. Courts

NATIONAL BISCUIT COMPANY

TRADE MARK LITIGATION

Opinions, Orders, Injunctions and Decrees
Relating to Unfair Competition and
Infringement of Trade Marks

Fifth Edition

1915

T223
V4B6
1915

20065

15-20065

CONTENTS.

National Biscuit Company <i>v.</i> Thomas and Clarke	5
National Biscuit Company <i>v.</i> Baker	11
National Biscuit Company <i>v.</i> Kennedy	19
National Biscuit Company <i>v.</i> Ohio Baking Com- pany	29
National Biscuit Company <i>v.</i> Deininger	67
National Biscuit Company <i>v.</i> Dake Cracker Com- pany	75
National Biscuit Company <i>v.</i> Walter	85
National Biscuit Company <i>v.</i> Swick	93
National Biscuit Company <i>v.</i> Punchard	111
National Biscuit Company <i>v.</i> Hargrave Biscuit Co.	121
National Biscuit Company <i>v.</i> Hammell Cracker Co.	131
National Biscuit Company <i>v.</i> Whiteside.....	139
National Biscuit Company <i>v.</i> Pacific Coast Biscuit Company	173
Tables of Infringements abandoned without suit...	229

Circuit Court of the United States

NORTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

NATIONAL BISCUIT COMPANY
Complainant,

vs.

ALBERT V. THOMAS AND ROBERT D.
CLARKE

Defendants.

} IN EQUITY

DECREE

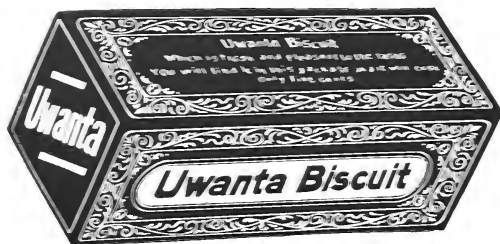
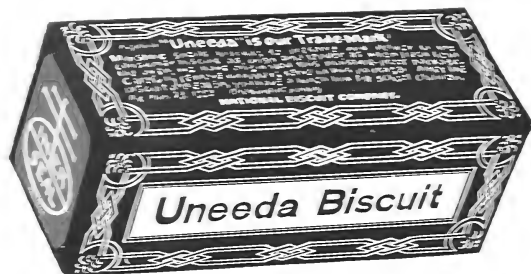
OFFIELD, TOWLE & LINTHICUM
CHARLES K. OFFIELD

For Complainant.

PEIRCE & FISHER

JAMES H. PEIRCE

For Defendants.



FINAL DECREE.

UNITED STATES CIRCUIT COURT,
NORTHERN DISTRICT OF ILLINOIS,
SOUTHERN DIVISION.

Monday, April 17, 1899.

Present: Honorable Christian C. Kohlsaatt, District Judge.

National Biscuit Company,
vs.
Albert V. Thomas and Robert D.
Clarke.

This day came the complainant, by Charles K. Offield, of the firm of Offield, Towle & Linthicum, its solicitors, and of counsel, and the defendants by James H. Peirce, of the firm of Messrs. Peirce & Fisher, their solicitors and of counsel, and thereupon the following proceedings were had:

This cause coming on to be heard upon final hearing, upon the pleadings and affidavits filed herein, and the respective counsel being heard for the respective parties thereon, and being duly considered, it is therefore ordered, adjudged and decreed as follows:

First: That the said word or name "Uneda" is a good and valid Trade-mark or trade name for biscuits, crackers and other bakery products, and that the title thereof, and the entire and exclusive right in the use of the same as a Trade-mark or trade name, vest in said complainant.

Second: That the package and wrapper thereof with the border and parallelogram arrangement upon the four longitudinal sides thereof, and the printed matter in relation thereto, as shown by "Complainant's Exhibit, Complainant's Package, Trade-mark and Wrapper," are the

equitable property, wrapper and label arrangement of the complainant herein, in connection with the manufacture and sale of biscuits, crackers and other bakery products.

Third: That the defendants have infringed upon and violated the rights of the complainant by the use of the name or word "Uwanta" as a close imitation and simulation of the Trade-mark or name "Uneeda" of the complainant, and have closely imitated and simulated the package of the said complainant as to size and form, and the wrapper thereof as to arrangement of border, respective parallelograms and printed matter, in relation thereto, in the sale of the biscuits and crackers of said defendants.

Fourth: That the said defendants, Albert V. Thomas and Robert D. Clarke, and each of them, and their respective agents, servants and employes, and each of them, be and hereby are perpetually enjoined from affixing, using or causing or permitting to be used or affixed to or upon any biscuits, crackers or other bakery products or packages manufactured by them, or bought or procured or sold by them or for them or either of them, or in which they are in any manner interested, the word "Uneeda" or the word "Uwanta" or any word or synonym thereof or any word calculated to deceive or mislead, or any word colorably different therefrom, and from affixing to any package, biscuit, crackers or bakery products any wrapper, label or other covering having thereon a border and parallelogram arrangement and accompanying letters in substantial imitation of the wrapper, label and package or box arrangement of the said complainant, and only colorably different therefrom, or from using any box or package construction, wrapper or label arrangement thereof, in the sale of biscuits, crackers and other bakery products, so contrived as to lead to the belief or to be calculated to lead to the belief, or to be liable to cause the public to believe, that the biscuits or crackers con-

tained in such box, packages, wrappers or other covering, was manufactured or sold by the complainant.

Fifth: It further appearing to the court that the said parties have agreed to settle the question of damages to the complainant and profits to the defendants out of court, within thirty days hereafter, no reference to Master for an accounting is at this time made.

Sixth: It is further ordered, adjudged and decreed, that the defendants pay the costs herein to be taxed, and that complainant have execution therefor.

NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION. }

I, S. W. Burnham, Clerk of the Circuit Court of the United States, for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the Decree entered of record in said Court on the 17th day of April, A. D. 1899, in the cause wherein National Biscuit Company, is the complainant and Albert V. Thomas and Robert D. Clarke are the defendants, as the same appears from the original thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Chicago, in said District, this 18th day of April, A. D. 1899.

S. W. BURNHAM,
Clerk.



Circuit Court of the United States

SOUTHERN DISTRICT OF NEW YORK

NATIONAL BISCUIT COMPANY
Complainant,

vs.

HENRY D. BAKER and JOHN P. BAKER
Defendants.

} IN EQUITY

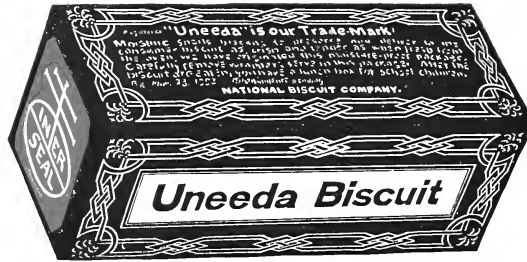
OPINION AND ORDER GRANTING INJUNCTION

OFFIELD, TOWLE & LINTHICUM
CHARLES K. OFFIELD

For Complainant.

BRIESEN & KNAUTH
ARTHUR v. BRIESEN

For Defendants.



NATIONAL BISCUIT COMPANY *vs.* BAKER ET AL.
(Circuit Court of the United States, Southern District New York,
June 27, 1899.)

UNFAIR COMPETITION—PRELIMINARY INJUNCTION.

“Uneeda,” as applied to a biscuit, is a proper trade-mark; and the proprietor is entitled to an injunction against the use of “Iwanta” by another manufacturer as the name of a similar biscuit put up and sold to the trade in packages so similar as to be calculated to deceive consumers.¹

Motion for preliminary injunction against sellers of alleged infringing goods; the action being defended by the Ward-Mackey Company, of Pittsburg, Pa., makers of the same.

Charles K. Offield, for the motion.

Arthur v. Briesen, opposed.

LACOMBE, Circuit Judge. This case is too plain to waste many words over it,—the principles of trade-mark infringement and of unfair competition have been so often discussed in this circuit. That “Uneeda,” as applied to biscuit, is a proper trade-mark, and that complainant is entitled to its exclusive use in that connection, is hardly disputed. That it has been most extensively advertised, presumably at great expense, is matter of common knowledge, and is asserted in the moving papers. Defendants present the usual voluminous bundle of affidavits by persons in the trade to the effect that in their opinion no one is likely to mistake defendants’ biscuit for complainant’s. As has been often pointed out before, it makes no differ-

¹As to what constitutes unfair competition, see note to *Scheuer v. Muller*, 20 C. C. A. 165, and supplementary thereto, under same title, note to *Lare v. Harper*, 30 C. C. A. 376.

ence that dealers in the article are not deceived. No one expects that they will be. It is the probable experience of the consumer that the court considers. Here, too, we have the manufacturer of the articles complained of, who explains, as usual, that, in adopting a trade name by which to identify his own product, he has been most "careful not to trespass on any rights" of complainant, and that "after considerable thought" he selected a name which should make the difference between his goods and complainant's "distinct and plain, so that there could be no possibility of mistake." It is a curious fact that so many manufacturers of proprietary articles, when confronted with some well-advertised trade name or mark of a rival manufacturer, seem to find their inventive faculties so singularly unresponsive to their efforts to differentiate. Thus, in one case, with the word "Cottolene" before him, defendant's best effort at differentiation resulted in "Cottoleo," and "Mongolia" seemed to another defendant entirely unlike "Magnolia." The manufacturer of the articles which defendants in the case at bar are selling seems to have had no better luck, for, with the word "Uneeda" before him, his device to avoid confusion was the adoption of the word "Iwanta." The incessant use of the personal pronouns in daily speech has associated in every one's mind the sounds represented by the letters "I" and "U"; the two words are of precisely the same length; both end with the same letter, "A"; and both express the same idea, namely, that the prospective purchaser's personal comfort would be promoted by the acquisition of a biscuit. There are, as also is usual, a number of minor differences between the forms and the dress of the two packages, which are expatiated upon in the affidavits and the brief; but no one can look at both packages without perceiving that there are strong resemblances, which could easily have been avoided had there been an honest effort to give defendants' goods a distinctive dress. Both

name and dress are clearly calculated to mislead, and the statements that both were adopted with an eye single to differentiation strain the credulity of the court beyond the breaking point. Complainant may take a preliminary injunction against the use of the trade-name "Iwanta," and of the present style of package; also against similar colorable imitations of complainant's trade-name, "Uneda," and of his style of package.

95 Fed. Rep., 135.

INJUNCTION ORDER.

UNITED STATES CIRCUIT COURT.

Southern District of New York.

National Biscuit Company,	} In Equity.
<i>Complainant,</i>	
<i>vs.</i>	
Henry D. Baker and John P.	
Baker,	
<i>Defendants.</i>	

Complainant having moved the Court that a preliminary injunction issue against the above-named defendants in accordance with the prayer of the bill of complaint herein, and Charles K. Offield, Esq., of counsel for complainant, having been heard in support of the motion, and Arthur v. Briesen, Esq., of counsel for defendants, having been heard in opposition; it is, on motion of Offield, Towle & Linthicum, complainant's solicitors,

ORDERED that the said motion be and the same hereby is granted and that an injunction issue against the said defendants Henry D. Baker and John P. Baker and each of them and their respective agents, servants and employees and each of them enjoining and restraining them until the further order of this court from affixing, using or causing or permitting to be used or affixed to or upon any biscuits, crackers or other bakery products or packages thereof, handled or sold by them, or bought or procured to be sold by them, or for them, or either of them, or in which they are in any manner interested, the word "Iwanta" or "Uneeda", or against similar colorable imitation thereof, or from affixing to any package of biscuit, crackers, or other bakery products, any wrapper, label or other covering in substantial imitation of the wrapper, label and

package of said complainant, or any similar colorable imitation of complainant's style of package, so contrived as to lead to the belief or to be calculated to lead to the belief or to be liable to cause the public to believe that the biscuit or crackers contained in such package, wrapper or other covering are manufactured and sold by the complainant.

Dated New York, Aug. 11, 1899.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed): United States Circuit Court, Southern District of New York.—National Biscuit Company, Complainant, *vs.* Henry D. Baker and John P. Baker, Defendants.—Order.—Briesen & Knauth, Solicitors for Defendants, 229 Broadway, Borough of Manhattan, New York.—U. S. Circuit Court, Filed Aug. 11, 1899, John A. Shields, Clerk.

UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF NEW YORK. } ss.

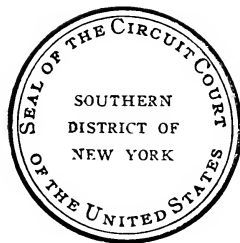
I, John A. Shields, clerk of the Circuit Court of the United States in and for the Second Circuit and Southern District of New York,

Do Hereby Certify that I have compared the preceding with the original Order granting Injunction in the cause entitled National Biscuit Company, Complainant, *vs.* Henry D. Baker and John P. Baker, Defendants, on file

and of record in my office, and that the same is a true and correct transcript therefrom, and of the whole of said original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at the City of New York, in the District and Circuit above-named, this 27th day of May in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth.

JOHN A. SHIELDS,
Clerk.



Circuit Court of the United States

NORTHERN DISTRICT OF ILLINOIS

NORTHERN DIVISION

NATIONAL BISCUIT COMPANY
Complainant,

vs.

THEODORE WEISE AND JOHN P.
KENNEDY,

Defendants.

} IN EQUITY }

ORDER, INJUNCTION AND ORDER
MAKING INJUNCTION PERPETUAL

OFFIELD, TOWLE & LINTHICUM

For Complainant.

ARCHIBALD CATTEL

For Defendants.

INJUNCTION ORDER.

CIRCUIT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF ILLINOIS,

NORTHERN DIVISION.

July 5, 1900,

Present, Hon. Christian C. Kohlsaatt, District Judge.

National Biscuit Company,	} Bill for Infringement	
25,598 <i>vs.</i>		of Trade-Mark and
Theodore Weise and John P.		Equitable Rights.
Kennedy.		

This case coming on to be heard upon motion for preliminary injunction upon pleadings and affidavits filed and exhibits referred to, and having been duly heard and considered, it is ordered, adjudged and decreed as follows:

First: That the said complainant has good title and right in and to the said trade-mark or name "Kennedy's," or "Kennedy's Biscuit" and "Kennedy's City Soda Crackers" as applied to bakery products, and in and to the particular and special label, package or carton associated with the sale thereof as identified by the bill of complaint and filed herein.

Second: That the said defendants have violated and infringed upon said complainant's right, title and interest in and to said trade-name, marks or words "Kennedy's," "Kennedy's Biscuit" and "Kennedy's City Soda Crackers," and in and to the label, carton and package identified therewith.

Third: That the said defendants, and each of them, their servants and agents, and all claiming or holding through or under them, be until further order of the court enjoined and restrained from in any manner what-

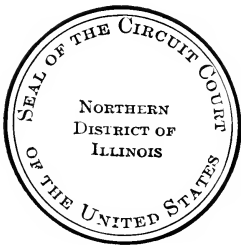
soever making use of the words "Kennedy's," "Kennedy's City Soda Crackers" or "Kennedy's Biscuit," or any words substantially like the same as the name or designation, or as any part of the name or designation, of any bakery products whatsoever not by or for the complainant manufactured; and from in any manner whatsoever making use of the words "Kennedy's," "Kennedy's City Soda Crackers" or "Kennedy's Biscuit," or any words substantially like the same, as the name or designation, or as any part of the name or designation, of any bakery products whatsoever not manufactured by or for the complainant, which shall be put up in carton like those hereinbefore described as the packages by the defendants used and availed of, and otherwise in every way from making use in connection with the manufacture or sale of bakery products whatsoever, not of the complainant's production, of packages which shall be so nearly like the complainant's packages hereinbefore described as to be calculated to mislead; and otherwise in every way enjoining and restraining the said defendants from fraudulently making use of the words "Kennedy's" "Kennedy's City Soda Crackers" or "Kennedy's Biscuit" in connection with the sale of bakery products, and from doing any act or thing whatsoever that shall be calculated to cause any bakery products not manufactured by the complainant to be offered or sold as "Kennedy's Biscuit" or "Kennedy's City Soda Crackers," or as bakery products or crackers manufactured by or for the complainant.

NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION. }

I, Marshall E. Sampsell, clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the order entered of record in said court on the 5th day of July, A. D. 1900, in the cause wherein National Biscuit Company is the complainant and Theodore Weise *et al.* are the defendants, as the same appears from the original records thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago in said district, this 26th day of May, A. D. 1904.

MARSHALL E. SAMPELL,
Clerk.



INJUNCTION.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
 NORTHERN DISTRICT OF ILLINOIS,
 NORTHERN DIVISION. } ss.

THE UNITED STATES OF AMERICA,

To Theodore Weise and John P. Kennedy and to your Counselors, Attorneys, Solicitors, Trustees, Agents, Clerks, Employes, Servants and Workmen, and to each and every of you, Greeting:

WHEREAS, It hath been represented to the Judges of our Circuit Court of the United States for the Northern Division of the Northern District of Illinois in Chancery sitting, on the part of National Biscuit Company, complainant, in its certain bill of complaint, exhibited in our said Circuit Court, on the Chancery side thereof, before the Judges of said Court, against you, the said Theodore Weise and John P. Kennedy, to be relieved touching the matters complained of. In which said bill it is stated, among other things, that you are combining and confederating with others to injure the complainant touching the matters set forth in said bill, and that your actings and doings in the premises are contrary to equity and good conscience. And it being ordered that a Writ of Preliminary Injunction issue out of said court, upon said bill, enjoining and restraining you, and each of you, as prayed for in said bill; We therefore, in consideration thereof, and of the particular matters in said bill set forth, do strictly command you, the said Theodore Weise and John P. Kennedy, your Counselors, Attorneys, Solicitors, Trustees, Agents, Clerks, Employes, Servants and Workmen, and each and every of you, that you DO ABSOLUTELY DESIST AND REFRAIN FROM in any manner whatso-

ever making use of the words "Kennedy's," "Kennedy's City Soda Crackers" or "Kennedy's Biscuit," or any words substantially like the same as the name or designation, or as any part of the name or designation, of any bakery products whatsoever not by or for the complainant manufactured; and from in any manner whatsoever making use of the words "Kennedy's," "Kennedy's City Soda Crackers" or "Kennedy's Biscuit," or any words substantially like the same, as the name or designation, or as any part of the name or designation, of any bakery products whatsoever not manufactured by or for the complainant, which shall be put up in a carton like those hereinbefore described as the packages by the defendants used and availed of, and otherwise in every way from making use in connection with the manufacture or sale of bakery products whatsoever, not of the complainant's production, of packages which shall be so nearly like the complainant's packages hereinbefore described as to be calculated to mislead; and otherwise in every way enjoining and restraining the said defendants from fraudulently making use of the words "Kennedy's," "Kennedy's City Soda Crackers" or "Kennedy's Biscuit" in connection with the sale of bakery products; and from doing any act or thing whatsoever that shall be calculated to cause any bakery products not manufactured by the complainant to be offered or sold as "Kennedy's Biscuit" or "Kennedy's City Soda Crackers," or as bakery products or crackers manufactured by or for the complainant, until this Honorable Court, in Chancery sitting, shall make other order to the contrary. Hereof fail not, under penalty of what the law directs.

To the Marshal of the Northern District of Illinois, to execute, and return in due form of law.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago, in said District, this 5th day of July, in the year of our Lord one

thousand nine hundred and of our Independence the one hundred and twenty-fifth year.

S. W. BURNHAM,
Clerk.

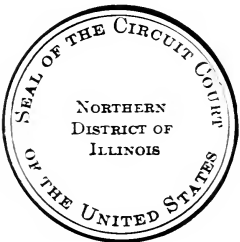


NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION.

I, Marshall E. Sampsell, Clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the injunction writ, filed in said court on the 8th day of July, A. D. 1904, in the cause wherein National Biscuit Company, is the complainant and Theodore Weise *et al.* are the defendants, as the same appears from the original now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 8th day of July, A. D. 1904.

MARSHALL E. SAMPSELL,
Clerk.



ORDER MAKING INJUNCTION PERMANENT.

CIRCUIT COURT OF THE UNITED STATES,
NORTHERN DISTRICT OF ILLINOIS,
NORTHERN DIVISION.

June 5, 1902.

Present, Hon. Christian C. Kohlsaatt, District Judge.

National Biscuit Company, 25,598 <i>vs.</i> Theodore Weise and John P. Kennedy.	}	Bill for Infringement of Trade-Mark and Equitable Rights.
--	---	---

This cause coming on to be heard upon the pleadings as filed herein, Messrs. Offield, Towle & Linthicum appearing as solicitors and of counsel for said complainant, the National Biscuit Company, Mr. Archibald Cattell appearing as solicitor and of counsel for the said defendants, Theodore Weise and John P. Kennedy, and it appearing to the court that the defendants do not desire further to contest this action, and that they have settled with the complainant for the damages, profits and costs arising out of the acts complained of, and that nothing remains as to said litigation except as to the subject-matter of the injunction. It is therefore ordered, adjudged and decreed, as follows, viz.:

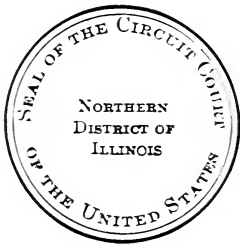
That the *Interlocutory* injunction heretofore issued and served upon the defendants in this cause be, and the same hereby is, made *perpetual*, and that this decree be entered and stand as a final decree in the above cause.

NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION. }

I, Marshall E. Sampsell, clerk of the Circuit Court of the United States, for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the order entered of record in said court on the 5th day of June, A. D. 1902, in the cause wherein National Biscuit Company is the complainant and Theodore Weise *et al.* are the defendants, as the same appears from the original records thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said District, this 26th day of May, A. D. 1904.

MARSHALL E. SAMPSELL,
Clerk.



Circuit Court of the United States

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

NATIONAL BISCUIT COMPANY
Complainant,

vs.

THE OHIO BAKING COMPANY, STEPHEN
C. MORRIS and GEORGE E. COLLINGS
Defendants.

IN EQUITY
No. 6131

OPINION AND DECREE

SQUIRE, SANDERS & DEMPSEY
OFFIELD, TOWLE & LINTHICUM
EARL D. BABST

For Complainant.

BANNING & BANNING
BENJAMIN C. STARR

For Defendants.



NATIONAL BISCUIT COMPANY *vs.* OHIO BAKING COMPANY ET AL.

(Circuit Court of the United States, Northern District Ohio, Eastern Division. December 21, 1900.)

No. 6131.

1. UNFAIR COMPETITION—IMITATION OF PACKAGES.

While a defendant may have the right to use every one of the elements entering into complainant's trade-mark and packages if used separately, yet his use of the same in combination, for the evident purpose of imitating in appearance complainant's packages, constitutes unfair competition.

In Equity. On motion for preliminary injunction. For opinion on appeal, see 127 Fed., 116.

Squire, Sanders & Dempsey, Offield, Towle & Linthicum, and Earl D. Babst, for complainant.

Banning & Banning and Benjamin C. Starr, for defendants.

WANTY, District Judge. In this case a motion for a preliminary injunction has heretofore been filed, and was argued the other day, and I have come to a conclusion in the matter. The bill in this case was filed to restrain the defendants from infringing the complainant's trade-mark and to restrain fraudulent competition in imitating the complainant's packages or cartons in size and color and general appearance. The defendants claim that they have the right to use the straight lines and curves in a trade-mark, that they have the right to use the word "seal," that they have the right to use white lines on a red background, and that they have the right to use cartons of a particular size, and that they have the right to use the

¶1 Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

different colors which they have adopted for their packages, and that the complainant cannot appropriate any of these things so as to preclude others from their use. All of these claims of the defendants are true, but it is apparent, under the showing here, that the defendants deliberately sat down and made their packages as like in general appearance to the complainant's packages as would be necessary to catch the customer and escape the courts. They had the right to use the background used by the complainant, they had the right to use clipped corners and the word "Seal," they had the right to use any color that the complainant used for cartons, and they had the right to use packages of the size used by the complainant. But when they used all these things in combination, the object is too apparent to admit of argument. The defendants put up a package which they say is exactly the size of complainant's package, because it contains the same quantity of crackers, which, if put up in a convenient manner, necessarily compels the use of the same-size package. But this does not explain why on the largest-size package the defendants have the exact shade of red used by complainant, and have the white lettering of substantially the same type, and on the next-size package, they have blue, like complainant's. Why did they not use blue on the largest-size package and red on the smaller? No one can read the pleadings and affidavits in this case and escape the conclusion that the defendants are endeavoring to appropriate the trade of the complainant by imitating, in its general effect, its seal and packages, and to escape the legal effect of such an attempt by making dissimilar minor details. The fraud is apparent, and the motion for a preliminary injunction will be granted.

127 Fed. Rep., 160.

FINAL DECREE.

THE UNITED STATES OF AMERICA, }
 NORTHERN DISTRICT OF OHIO, } ss.
 EASTERN DIVISION.

At a stated term of the Circuit Court of the United States, within and for the Eastern Division of the Northern District of Ohio, begun and held at the City of Cleveland, in said District, on the first Tuesday in April, being the 7th day of said month, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States of America the one hundred and twenty-seventh, to wit: On Friday, the 22nd day of May, A. D. 1903.

Present: The Honorable Francis J. Wing, U. S. District Judge.

Among the proceedings then and there had were the following, to wit:

National Biscuit Company,	} In Equity. 6131.
<i>vs.</i>	
The Ohio Baking Company,	
Stephen C. Morris, and George E. Collings.	

This cause coming on to be heard upon pleadings and proof, and having been fully argued by counsel respectively for both parties litigant; Mr. Charles K. Offield, Mr. Andrew Squire, and Mr. Earl D. Babst, for Complainant; Mr. Thomas A. Banning, and Mr. Benjamin C. Starr, for Defendants: And the court being fully advised, and having fully considered the same, ORDERS, ADJUDGES, and DECREES as follows:

1. That the said Complainant, the National Biscuit Company's "In-er-seal" Trade Mark is a good and valid

Trade Mark, and the complainant has full right and title thereto, and therein, as alleged in said bill of complaint filed herein.

2. That the said defendants have infringed upon and violated said complainant's "In-er-seal" Trade Mark, as alleged in said bill of complaint, by putting up and selling bakery products in cartons or packages like those marked "Complainant's Exhibits Defendants' Infringing Packages Nos. 1, 2 and 3" and "Defendants' Exhibits Nos. 13, 14 and 15."

3. That the said defendants have violated complainant's equitable rights; in putting up, selling and offering for sale, cartons or packages of bakery products which present a general appearance as to collocation of size, shape, color, lettering, spacing and ornamentation, closely resembling complainant's several exhibits respectively referred to in the bill of complaint, and marked as "Complainant's Exhibits."

4. That the said defendants, and each of them, their agents, servants, and employes, be and hereby are, enjoined until the further order of this court from

a. Imitating or simulating complainant's "In-er-seal" Trade Mark, or manufacturing, handling, or selling cartons of bakery products having thereon any imitation of complainant's "In-er-seal" Trade Mark, calculated to mislead or deceive; like those marked Complainant's Exhibits Defendants' Infringing Packages Nos. 1, 2 and 3, and Defendants' Exhibits Nos. 13, 14 and 15, but this shall not be construed as restraining defendants from selling cartons or packages of bakery products with their asserted Trade Mark thereon, provided such Trade Mark is so differentiated in general appearance and application from said complainant's Trade Mark that it is not calculated to deceive the ultimate ordinary purchaser.

b. From putting up and selling, or offering for sale, the

particular forms of cartons or packages referred to in the bill of complaint, and identified therein as "Complainant's Exhibit Defendants' Infringing Packages Nos. 1, 2 and 3," or any other form of packages or cartons, respectively, which shall, by reason of the collocation of size, shape, colors, lettering, spacing and ornamentation, present a general appearance as closely resembling complainant's several exhibits respectively referred to in the bill of complaint and marked as Complainant's Exhibits—as do the said defendants' respectively infringing packages Nos. 1, 2 and 3, but this shall not be construed as restraining defendants from selling packages or cartons of the size, weight and shape of complainant's packages, nor from using the respective colors as wrappers for such packages, provided such packages are so differentiated in general appearance from said complainant's respective packages that they are not calculated to deceive the ultimate ordinary purchaser.

5. That the said complainant has a right to recover any and all profits accruing to the said defendants from the unlawful violation and infringement of said complainant's rights, and to recover all damages suffered by and accruing to said complainant by reason of the commitment of said unlawful and infringing acts, together with the costs herein to be taxed, and that the same may be referred to Irvin Belford, he being a suitable person as Master of this Court, and approved by the parties to take, state and report an account of such damages and profits under and in accordance with this decree, and that upon such accounting the testimony heretofore taken by either party in this case, may be read by either party, and referred to and considered by said master.

In open court the defendant prayed an appeal, which was allowed and bond fixed at \$500.00.

THE UNITED STATES, {
OF AMERICA. } ss.

I, Irvin Belford, Clerk of the Circuit Court of the United States, within and for the Northern District of the State of Ohio, do hereby certify that I have compared the within and foregoing transcript with the original decree entered upon the Journal of the proceedings of said Court in the therein entitled Cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Cleveland, in said District, this 1st day of June, A. D. 1903, and in the 127th year of the Independence of the United States of America.

IRVIN BELFORD,
Clerk.

By THOMAS M. SHERLOCK,
Deputy Clerk.



United States Circuit Court of Appeals

SIXTH CIRCUIT

OHIO BAKING COMPANY, STEPHEN C.
MORRIS and GEORGE E. COLLINGS,

Appellants,

vs.

NATIONAL BISCUIT COMPANY

Appellee.

IN EQUITY
No. 1232

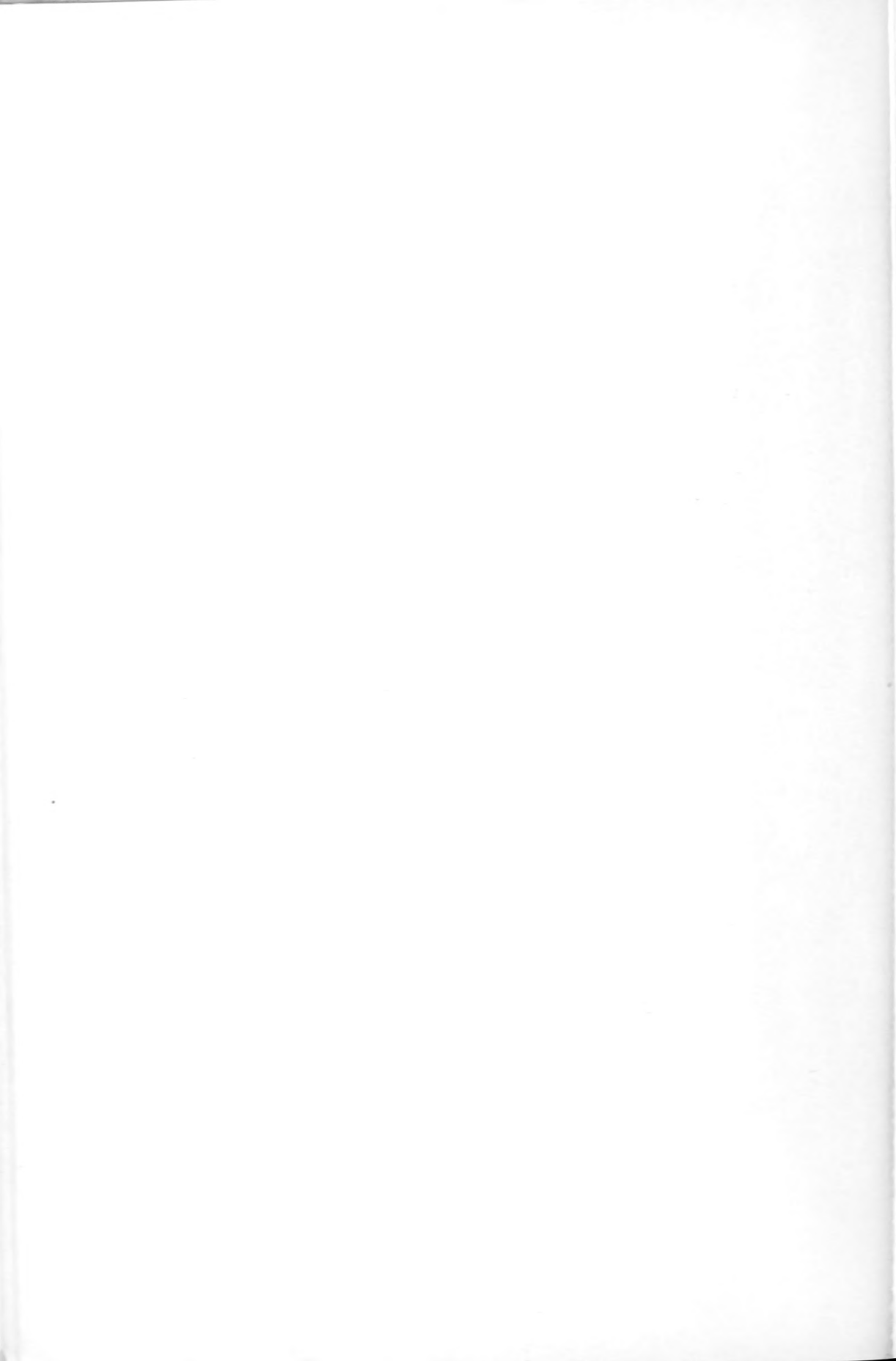
OPINION

THOMAS A. BANNING
EPHRAIM BANNING
BENJAMIN C. STARR

For Appellants.

SQUIRE, SANDERS & DEMPSEY
OFFIELD, TOWLE & LINTHICUM
EARL D. BABST

For Appellee.



OHIO BAKING CO. ET AL *vs.* NATIONAL BISCUIT COMPANY

(Circuit Court of Appeals of the United States, Sixth Circuit.
January 21, 1904.)

No. 1232.

1. TRADE MARK—PROTECTION—INFRINGEMENT.

The right of the owner of a trade-mark to be protected in the exclusive use thereof is not dependent on the federal statute authorizing registration.

2. SAME—NATURE OF RELIEF—UNFAIR DOMESTIC COMPETITION.

Where the ground for relief in a suit for infringement of a trade-mark was unfair competition in domestic commerce, and the cause of action alleged was an imitation of plaintiff's trade-mark on cartons used in local trade, and there was no allegation that complainant's foreign trade was injured by the acts complained of, the fact that the trade-mark was registered, and that complainant was entitled to protection under the federal statute with regard to foreign commerce, was immaterial.

3. SAME—EVIDENCE.

Complainant's "In-er-seal" trade-mark, as known to the public, was printed in white letters on a vivid red back-ground of a peculiar shade, and applied to the ends of cracker and biscuit cartons, in which complainant's goods were packed for sale. Shortly, thereafter defendant conceived a trade-mark with the words "Factory Seal" printed on the same colored labels, which it applied to the ends of similar packages of its biscuits. At the time defendant adopted this trade-mark it knew complainant's crackers were the only ones sold with the red seal on the end of the cartons, and that its trade-marks were liable to deceive careless purchasers. *Held*, that defendants' trade-mark, when so printed and used, was an infringement on complainant's trade-mark, and should be enjoined.

Appeal from the Circuit Court of the United States for the Northern District of Ohio. For opinion below, see 127 Fed., 160.

Thomas A. Banning, Ephraim Banning, and Benjamin C. Starr, for appellants.

Squire, Sanders & Dempsey, Earl D. Babst, and Offield, Towle & Linthicum, for appellee.

Before LURTON and RICHARDS, Circuit Judges, and THOMPSON, District Judge.

RICHARDS, Circuit Judge. In March, 1900, the complainant below, the National Biscuit Company, was engaged in the manufacture and sale of bakery products, consisting of biscuits, crackers, etc. It owned and operated some 75 plants, located in the leading cities of the United States, the products of which were put out in packages or cartons under different factory names, indicating their character and origin. For the purpose of identifying all these products, making them known to the public, and guarantying their authenticity, it adopted an arbitrary design or symbol known as the "In-er-seal" trade-mark for use on its cartons, and at a cost of hundreds of thousands of dollars advertised it throughout this country and the world as the mark by which its goods might be recognized. Except for the use of some green and orange labels, which were soon abandoned, the "In-er Seal" trade-mark was printed in white letters upon a vivid red label with clipped corners, and applied to the ends of the cartons. The trade-mark was registered, the application being filed May 12, 1900. In the latter part of August, 1900, the defendant below, the Ohio Baking Company, was engaged at Cleveland, Ohio, in making and selling bread and cakes. It had been so engaged for 17 years. At this time, having decided to enter upon the biscuit and cracker business, it employed one Miles, a former employe of the National Biscuit Company, and gave him charge as manager of the cracker department about to be established. Within three or four weeks afterwards it began to place its biscuits and crackers upon the market, packed in cartons of substantially the same size as those used by the National Biscuit Company, and in some cases of the same color, style of ornamentation, and general appearance, all having on the ends, printed in white letters upon red labels with clipped corners, a fanciful figure, known as the "Factory Seal"

trade-mark, which the Ohio Baking Company, upon entering the cracker business, for the first time adopted and began to use. This trade-mark was registered, the application being filed October 9, 1900. For the purpose of comparison, the two trade-marks are shown in the following illustrations, the vivid red background being designated by the black background:



The original suit was brought by the National Biscuit Company, to restrain the Ohio Baking Company and its officers from advertising or selling its goods in any package having on it the "In-er-seal" trade-mark or any imitation thereof, or in any package dressed in imitation of one used by the National Biscuit Company, and for an accounting of the profits made by such unfair competition.

On an application for a preliminary injunction, Judge Wanty restrained the defendant below, first, from using the "In-er-seal" trade-mark upon cartons containing its bakery products, as shown in certain exhibits, or advertising or selling its bakery products in cartons containing thereon the "In-er-seal" trade-mark or any imitation thereof; and, second, from putting up and selling or offering for sale the particular cartons shown in certain exhibits, or any other cartons resembling the complainant's cartons as closely as they do. But this was not to be construed as restraining the defendant from selling cartons of the size, weight, and shape of the complainant's, nor from using the respective colors as wrappers, provided they were so differentiated in general appearance as not to be calculated to deceive the ultimate ordinary purchaser. There was an appeal from Judge Wanty's order, and this court reversed the portion respecting the use of the "In-er-seal" trade-mark or any imitation thereof, but affirmed the rest. Upon the return of the case to the Circuit Court, an application was made to Judge Severens for an attachment for contempt against the defendant below for putting out certain cartons in violation of the second part of Judge Wanty's order, but Judge Severens discharged the rule, holding that the cartons did not present a general appearance so closely resembling the complainant's exhibit mentioned in the restraining order as to come within its terms. Afterwards the case came on for

hearing before the Circuit Court, Judge Wing sitting, upon the pleadings and proof, and a decree was rendered in favor of the complainant, holding: (1) That the "In-er-seal" trade-mark is a good and valid trade-mark. (2) That the defendants have infringed this trade-mark by putting up and selling bakery products in cartons like those shown in certain exhibits mentioned. (3) That the defendants have violated the complainant's equitable rights in putting up and selling its bakery products in cartons which present a general appearance closely resembling those of the complainant as shown in certain exhibits. (4) That the defendants be enjoined: (a) From imitating the "In-er-seal" trade-mark, or making, handling, or selling cartons of bakery products having thereon any imitation of the "In-er-seal" trade-mark, calculated to mislead or deceive, like those shown in certain exhibits; "but this shall not be construed as restraining defendants from selling cartons or packages of bakery products with their asserted trade-mark thereon, provided such trade-mark is so differentiated in general appearance and application from said complainant's trade-mark that it is not calculated to deceive the ultimate ordinary purchaser." (b) From putting up and selling or offering for sale the particular forms of cartons shown in certain exhibits, or cartons resembling them so closely as to mislead or deceive; but this shall not be construed as restraining the defendants from selling cartons of the size, weight, and shape of the complainant's, but so differentiated in general appearance as not to be calculated to deceive the ordinary purchaser. (5) That the complainant has the right to recover all profits accruing from the violation and infringement of its rights, and that the case be referred to a master to take and report an account of the damages and profits. From this decree an appeal has been taken to this court.

The right to be protected in the exclusive use of a trade-mark is not dependent on the federal statute authorizing the registration of certain trade-marks. It has been long recognized by the common law and enforced by the chancery courts of England and this country. The use of a trade-mark is to distinguish one's goods. No man has a right to use or imitate the trade-mark of another, and thus represent his goods as the goods of another. However broad the field of competition, it does not include the use of a rival's trade-mark, either directly or covertly, for the purpose of deceiving the public, and marketing his own goods as those of his rival. The one question of fact in this case is whether the "Factory Seal" trade mark, when printed in white letters upon a red label with clipped corners, and applied to the ends of cartons containing bakery products, bears such a resemblance to the "In-er-seal" trade-mark, when similarly applied, as to deceive the ordinary purchaser, and lead him to believe he is purchasing the goods of the National Biscuit Company, when in fact he is getting the goods of the Ohio Baking Company. *McLean v. Fleming*, 96 U. S., 255, 24 L. Ed. 828; *Manufacturing Co. v. Trainer*, 101 U. S. 65, 25 L. Ed., 993; *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 Sup. Ct., 966, 37 L. Ed., 847. We have made a careful inspection of the cartons and trade-marks of the respective companies, and are satisfied not only that the "Factory Seal" trade-mark as applied is calculated to mislead and deceive the ordinary purchaser, but that it was designed, adopted, and used for that purpose. Its use was a part of the "cracker campaign" planned in advance. The National Biscuit Company's crackers were the only ones with a red seal on the end of the cartons. The defendants below knew this. And they knew also that crackers are sold for the most part over the counter to careless buyers, who are not apt to examine the carton carefully, but likely to carry in

mind some one distinguishing feature, such as a red seal on the ends. The crackers of the National Biscuit Company are put out under many names. Thus the plant at Toledo was called the Worts-Kirk-Bigelow plant, one at Chicago the Kennedy, another the Bremner, and so on. The name of the factory would mean nothing, the presence of the red seal everything to the servant girl or child sent to the grocery for a box of "In-er-seal" crackers. The careless purchaser asking for a box "of those red seal crackers" would take the "Factory Seal" goods, thinking he was getting the "In-er-seal" goods.

But it is insisted that this is a suit on a registered trade-mark, and that a trade-mark cannot be extended beyond the limits fixed in the registration. This is not, however, a suit on a registered trade-mark. Neither the allegations nor the proof would entitle the complainant to relief under the federal act. *Warner v. The Searle & Hereth Co.*, 191 U. S., 195, 24 Sup. Ct., 79, 48 L. Ed.—. There is no evidence showing that the trade of the National Biscuit Company with foreign countries was injured by the acts complained of. The ground of the relief sought is unfair competition in domestic commerce—the fraudulent imitation of the complainant's trade-mark and cartons for use in local trade. Conceding, as Mr. Justice Fuller says, in *Watch Co. v. Watch Case Co.*, 179 U. S., 666, 674, 21 Sup. Ct., 270, 45 L. Ed., 365, that in this class of cases "such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of," they are present in ample measure in the record. The trade-mark which the court is asked to protect is therefore, so far as this suit is concerned, a common-law trade-mark, and its limits are to be determined by its application and use. As Mr. Justice Shiras said in *Kohler Mfg. Co. v. Beeshore*, 59 Fed., 572, 575, 8 C. C. A., 215, 218: "We are not will-

ing to affirm the proposition that the registration in the Patent Office of a certain name or phrase as a trade-mark * * * will in all cases prevent or estop the owner from adopting and using another name or phrase as a trade-mark." The legal effect of the registry of a trade-mark being restricted to foreign commerce and that with the Indian tribes, it would seem that as to domestic commerce a person might adopt and use a different trade-mark than that registered. Now, the trade-mark actually used—the "In-er-seal" trade-mark, as known to the public—was printed in white letters upon a vivid red background of a peculiar shade. Before the defendants began to place their goods upon the market, this vivid red color had become associated with the "In-er-seal" trade-mark. The defendants below knew this when they put their "Factory Seal" trade-mark upon the vivid red background of precisely the same shade. While it is true no one has the right to monopolize a particular color, yet the courts have repeatedly held that a person may be restrained from using a particular color, in combination with other things, to mislead the public, and market his goods as those of another. *Garrett v. T. H. Garrett & Co.*, 78 Fed., 472, 24 C. C. A., 173; *Fairbank Co. v. Bell Mfg. Co.*, 77 Fed., 869, 23 C. C. A., 554; *Hires Co. v. Consumers' Co.*, 100 Fed., 809, 41 C. C. A., 71; *Morgan Co. v. Whittier Co.* (C. C.), 118 Fed., 657; *Cohen v. Delavina* (C. C.), 104 Fed. 946. We are satisfied that the "Factory Seal" trade-mark, when printed on the vivid red background and applied to the ends of a cracker or biscuit carton, is an infringement of the "In-er-seal" trade-mark, and should be enjoined.

It is submitted that the decree of the Circuit Court enjoining the use of any imitation of the "In-er-seal" trade-mark is inconsistent with the order of this court reversing the first part of Judge Wanty's restraining order re-

specting the trade-mark. But Judge Wanty's order restrained the use of the "Factory Seal" trade-mark in any manner whatsoever in connection with biscuit or cracker cartons, while the decree of the Circuit Court provides that it may be used when so differentiated in general appearance and application from the "In-er-seal" trade-mark as not to be calculated to deceive the ultimate ordinary purchaser. So that in affirming this decree, it is not necessary to prohibit the use in any manner whatsoever of the "Factory Seal" trade-mark, but only its use in a way calculated to mislead and deceive.

But, however this may be, the case is now before us upon the merits, which we have carefully examined, and we are satisfied that the manner in which the "Factory Seal" trade-mark has been used is calculated to mislead and deceive, and constitutes an infringement of the "In-er-seal" trade-mark.

The judgment of the Circuit Court is affirmed.

127 Fed. Rep., 116.

Supreme Court of the United States

OCTOBER TERM, 1904

OHIO BAKING COMPANY, STEPHEN C. MORRIS and GEORGE E. COLLINGS, <i>Petitioners,</i>	}	No. 382
<i>vs.</i> NATIONAL BISCUIT COMPANY <i>Respondent.</i>		

PETITION FOR WRIT OF CERTIORARI
AND ORDER DENYING PETITION

THOMAS A. BANNING EPHRAIM BANNING <i>For Petitioners.</i>
CHARLES K. OFFIELD EARL D. BABST <i>For Respondent.</i>



SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1904.

The Ohio Baking Company,
Stephen C. Morris and George
E. Collings,

Petitioners,

vs.

National Biscuit Company,
Respondent.

On Petition for Writ of
Certiorari directed to
the United States Cir-
cuit Court of Appeals
for the Sixth Circuit.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable the Chief Justice and Associate Jus-
tices of the Supreme Court of the United States:*

The petition of the Ohio Baking Company, a corpora-
tion organized and existing under and by virtue of the
laws of the State of Ohio, and Stephen C. Morris, treas-
urer and general manager of said company, and George
E. Collings, president of said company, respectfully
represents and shows unto your Honors as follows:

1. That about the 1st day of March, 1900, the Na-
tional Biscuit Company adopted what is generally known
as its "Iner Seal" trade-mark—being the misspelled
words "inner seal," indicating that the package was
sealed on the inside, and a purely arbitrary figure or de-
sign—for use on various kinds of bakery products in-
cluding biscuits, crackers, wafers, cakes, bread, snaps,
jumbles, etc. The trade-mark has usually been printed
on seals or labels which have been applied to the boxes,
packages or cartons in which the goods were put up for
the market. This seal or label has usually been applied
to the end of the carton or package. The trade-mark has
been printed on orange, green or red colored seals or

labels. The trade-mark printed on one of the red end labels or seals appears as follows:



2. That in the bill of complaint charging infringement of the complainant's "Iner Seal" trade-mark, in the fourth paragraph of the bill, the characteristics, peculiarities, and distinguishing things and features of such "Iner Seal" trade-mark are stated and alleged to be the following:

"An oval-shaped figure separated centrally and horizontally in the direction of its greatest length by a bar, from which there rises centrally and at right angles thereto a perpendicular bar, which near its upper end is intersected by double horizontal cross-bars, thus forming what might be designated as a "double-T-shaped" figure or cross tree, while within said oval-shaped section and above the horizontal dividing-bar and to the left of the perpendicular intersecting bar appear the letters "I N" and on the opposite side of said perpendicular intersecting bar and above said horizontal division-bar appear the letters "E R" the lower section of said oval-shaped figure having therein the word "Seal."

3. That the National Biscuit Company, registered its

“Iner Seal” trade-mark in the Patent Office, the certificate of registry being dated September 18, 1900, and numbered 35,108, on an application filed May 12, 1900. The certificate of registry of such trade-mark will be found in the Record, following page 160. In the specification of such registration, which was sworn to, the National Biscuit Company stated the things in which the trade-mark consisted as follows:

“Said trade-mark consists of an arbitrarily selected design or symbol representing an oval-shaped figure separated centrally and horizontally in the direction of its greatest length by a bar, from which there rises centrally and at right angles thereto a perpendicular bar, which near its upper end is intersected by double horizontal cross-bars, thus forming what might be designated as a “double-T-shaped” figure or cross-tree, while within said oval-shaped section and above the horizontal dividing-bar and to the left of the perpendicular intersection bar appear the letters “I N” and on the opposite side of said perpendicular intersecting bar and above said horizontal division-bar appear the letters “E R” the lower section of said oval-shaped figure having therein the word “Seal.”

And afterwards in said specification, after stating that the trade mark was not confined to the size of the end labels, nor to their application to the end of the package, nor to the shape of the label, nor to the size of the letters and figures, nor to the color of the letters and figures, nor to the color of the label or background, nor to the style of the letters, nor to the color of the border of the figure or the bars, nor to a white color for the letters or bars, the National Biscuit Company declared the real and essential features of the trade-mark in the following words:

“The essential and paramount feature of said trade-mark consisting of an oval-shaped figure divided centrally and horizontally in the direction of its greatest length by a bar from which extends a perpendicular bar which is intersected near its upper end by two horizontal cross-

bars, while within said oval-shaped figure and above said central horizontal bar appear the letters "I N" and "E R," while below said horizontal dividing-bar appears the word "Seal."

4. That about the 1st day of August, 1900, your petitioner, the Ohio Baking Company, adopted what is generally known as its "Factory Seal" trade-mark, consisting of the monogram word "Ohio," being the designating or localizing word of its corporate name. The words "factory seal" indicate that the package was filled and sealed at the factory so as to place responsibility in case the goods are found defective. The trade-mark has usually been applied to cartons or packages containing bakery products by printing it upon the end seals. The foundation color of these end seals or labels from the commencement has been red. A sample of such end seals is submitted as follows:



5. That your petitioner, the Ohio Baking Company, also registered its "Factory Seal" trade-mark in the Patent Office, the certificate of registry being dated December 18, 1900, and numbered 35,597, on an application filed October 9, 1900. The certificate of registry of such trade-mark will be found in the back of the record.

6. That in December, 1900, the National Biscuit Company filed its bill of complaint in the United States Circuit Court for the Northern District of Ohio, Eastern Division, charging your petitioners with infringement of its "Iner Seal" trade-mark, applied to packages and cartons of crackers and bakery products, by the use, by the Ohio Baking Company, of its "Factory Seal" trade-mark, the monogram word "Ohio," as shown in the sample above.

7. That in January, 1901, a preliminary injunction order was entered by his Honor, Judge George P. Wauty, restraining your petitioners, first, "from applying or using complainant's 'Iner Seal' trade-mark, in any manner whatsoever, upon or in connection with bakery products," as shown in certain infringing packages 1, 2 and 3; and, secondly, from putting up or selling cartons or packages like the packages 1, 2 and 3 or others "which shall, by reason of the collocation of size, shape, colors, lettering, spacing and ornamentation, present a general appearance closely resembling complainant's several exhibits respectively" as did the packages 1, 2 and 3, but at the same time the order provided that "this shall not be construed as restraining defendants from selling packages or cartons of the size, weight and shape of complainant's packages, nor from using the respective colors as wrappers for such packages, provided such packages are so differentiated in general appearance from said complainant's respective packages that they are not calculated to deceive the ultimate ordinary purchaser." (Record, 141-2.)

8. That an appeal was taken from the injunction order entered by Judge Wanty on an assignment of errors, appearing at page 143 of the record, which appeal was argued in the United States Circuit Court of Appeals for the Sixth Circuit in due course, resulting in an order by said Court of Appeals reversing the decree of Judge Wanty, so far as the infringement of the trade-mark was concerned, but affirming his decision so far as simulating complainant's wrappers was concerned. In accordance with such order, a mandate was issued and filed in the court below on the 24th day of June, 1901, as and for its judgment in the case. (Record, 147.)

9. That from the entry of the order of injunction by Judge Wanty until the 24th day of June, 1901, when the mandate was filed in the court below, your petitioner, the Ohio Baking Company, discontinued the use of its end seals containing its trade-mark—the monogram word “Ohio”—but when the mandate was filed on the 24th of June, 1901, it again began to use the same trade-mark—the monogram word “Ohio”—on its end labels precisely the same in every respect as it had used them before the decision of Judge Wanty; but it used such end labels and trade-marks on packages differing in the coloring and ornamentation of their wrappers from the original packages 1, 2 and 3, which had been enjoined. This was the only change made—the change in the wrappers.

10. That thereupon the National Biscuit Company moved before his Honor Judge Henry F. Severens, who was one of the judges who had heard and decided the case in the Court of Appeals, to have your petitioners attached for contempt of court; and the charge and denial of contempt were argued before him, and on the 24th day of August, 1901, an order was entered by him discharging the rule to show cause, etc. The opinion of Judge Severens will be found at page 149 of the Record,

and the order entered under such opinion will be found at page 150.

11. That thereupon proof for final hearing was taken by the parties respectively and the cause brought on for argument before his Honor Judge Francis J. Wing, on the 27th day of March, 1903. Judge Wing ordered a decree to be entered against your petitioners both as to the infringement of the trade-mark and as to the simulation of the wrappers of the cartons or packages. This decree was entered on the 22nd day of May, 1903, and will be found beginning at page 153 of the Record. A perpetual injunction was granted restraining your petitioners both as to the trade-mark and as to the simulation, and the case referred to a Master for an assessment of damages and profits.

12. That your petitioners thereupon prayed an appeal from the order and decision of Judge Wing to the United States Circuit Court of Appeals for the Sixth Circuit, in which court the appeal was duly argued, and on or about the 21st day of January, 1904, decided by said court, affirming Judge Wing's decision. (Rec., 170; 127 Fed. Rep., 116.)

13. That your petitioner attach hereto and submit herewith, as a part hereof, a certified printed copy of the record and the opinion of the United States Circuit Court of Appeals affirming the decision of Judge Wing, as the same are on file in the office of the clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

14. *That your petitioners have been aggrieved, and, as they believe, a miscarriage of justice has been caused in this case:*

By the confusion into which the Circuit Court and the Court of Appeals appear to have fallen as to the law relating to trade-marks proper and the law governing unfair competition;

By the conclusion of the Court of Appeals that the suit was not founded on the complainant's registered trade-mark, and, therefore, not subject to the same rules of construction as govern registered trade-marks;

By giving to the complainant's "Iner Seal" trade-mark, both in the Circuit Court and in the Court of Appeals, a broader construction than the complainant's pleadings and registration justified, inasmuch as the bill of complaint and the registration both stated that it consisted in certain things and features;

By apparently considering that the bill was for unfair competition in trade rather than for infringement of a technical trade-mark, and yet enjoining your petitioners as for the infringement of a technical trade-mark;

By protecting the complainant in the use of its trade-mark when "printed in white letters upon a vivid red background of a peculiar shade," notwithstanding the statements of the complainant's registration that the color of the end labels or seals was immaterial;

By giving the complainant a practical monopoly of the color red as a background for end seals or labels;

By finding infringement of the "Iner Seal" trade-mark because the "Factory Seal" trade-mark was printed in white letters on a red background;

By protecting the complainant in the use of red for its end seals or labels notwithstanding it was not using red end seals exclusively at the time the Ohio Baking Company began to use red end seals or labels, but was using other colors as well;

By not holding that the complainant had aisentitled itself to relief in equity for unfair competition in view of the evidence that it had adopted "substantially all colors" (Q. 24, Rec. 13) for the wrappers of its cartons or packages, thus seeking to monopolize all colors;

By holding that the "Factory Seal" trade-mark when

printed on a red background and applied to the ends of cracker or biscuit cartons was an infringement of the "Iner Seal" trade-mark, thus attaching importance to the color of the background on the trade-mark branch of the case;

By attaching importance in the trade-mark branch of the case to the manner in which the "Factory Seal" trade-mark had been used;

By holding that there had been an improper simulation of the complainant's wrappers in view of the fact that the complainant, in order to match up the color and appearance of the defendant's packages 1, 2 and 3, held to be an improper simulation, was obliged to bring in packages from its Chicago and Toledo factories;

By holding that the "careless purchaser asking for a box 'of those red seal crackers' would take the 'Factory Seal' goods, thinking he was getting the 'Iner Seal' goods," thus making the action of a careless person instead of an ordinary purchaser determinative of the probability of deception;

By disregarding the fact that the red color, white figures and letters, clipped corners, size of seal, etc., were shown by the evidence to be matters of utility instead of mere fanciful or arbitrary features;

By applying the abstract principle "that as to domestic commerce a person might adopt and use a different trade-mark than that registered" to this case where the complainant has not adopted and has not used a "different" trade-mark, but identically the one registered; and

By affirming the decision of Judge Wing and in not reversing such decision.

Wherefore, your petitioners pray that this Honorable Court will take cognizance of the matters herein set forth and referred to and will grant unto your petitioners a writ of certiorari requiring said cause and the

record thereof to be certified to it by the United States Circuit Court of Appeals for the Sixth Circuit, for its review and determination, pursuant to the provisions of the statute in such case made and provided, and that your petitioners may have such other and further relief in the premises as the nature and circumstances of their case may require.

And your petitioners will ever pray, etc.

THE OHIO BAKING CO.,
GEORGE E. COLLINGS,
STEPHEN C. MORRIS.

*United States of America, Northern District of Ohio,
State of Ohio, Cuyahoga County, ss:*

George E. Collings, president of the Ohio Baking Company, one of the above named petitioners, being duly sworn, upon oath says that he has read the foregoing petition and knows the contents thereof and that the same is true in substance and matter of fact.

GEORGE E. COLLINGS.

Subscribed and sworn to before me this 2nd day of September, 1904.

(SEAL)

F. T. SHOLES,
Notary Public.

We hereby certify that the foregoing stated grounds in support of the petition for a writ of certiorari in the above entitled cause, are, in our opinion, well founded in point of law.

THOMAS A. BANNING,
EPHRAIM BANNING,
Counsel for Petitioners.

ORDER DENYING PETITION.

SUPREME COURT OF THE UNITED STATES.

No. 382, October Term, 1904.

The Ohio Baking Company *et al.*,
Petitioners, }
vs.
 National Biscuit Company }

ON PETITION for writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

ON CONSIDERATION of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Sixth Circuit, and of the argument of counsel thereupon had, as well in support of as against the same, It is now here ordered by the Court that said petition be, and the same is hereby denied.

October 17, 1904.

A true copy.

Test: JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.



195 U. S., 630.

District Court of the United States

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

NATIONAL BISCUIT COMPANY
Complainant,

vs.

THE OHIO BAKING COMPANY, STEPHEN
C. MORRIS and GEORGE E. COLLINGS,
Defendants.

} IN EQUITY

ORDER FOR FINAL DECREE

OFFIELD, TOWLE, GRAVES & OFFIELD
EARL D. BABST

For Complainant.

KLINE, CLEVINGER, BUSS & HOLLIDAY

For Defendants.

ORDER FOR FINAL DECREE.

THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO, } ss.
EASTERN DIVISION.

At a stated term of the District Court of the United States, within and for the Eastern Division of the Northern District of Ohio, begun and held at the City of Cleveland, in said District, on the first Tuesday in October, being the 7th day of said month, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States of America, the one hundred and thirty-eighth, to-wit: on Monday, the 3rd day of November A. D. 1913.

Present:—Honorable WILLIAM L. DAY, United States District Judge.

Among the proceedings then and there had were the following, to-wit:

National Biscuit Company }
 vs. } No. 5. Equity.
The Ohio Baking Company *et al.* }

Pursuant to stipulation filed by counsel in this cause,

IT IS ORDERED, that the defendants having made settlement of all claims for profits, damages and costs and otherwise, arising hereunder, the reference to the Master shall be withdrawn, and the interlocutory decree heretofore entered in this cause be made final, such decree having been affirmed by the United States Circuit Court of Appeals for the Sixth Circuit, upon appeal, and the Supreme Court of the United States having refused to disturb said decree upon certiorari petition filed by defendants; and it is further ordered that the plaintiff shall pay all costs herein, as taxed by the Court, now remaining unpaid.

THE UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF OHIO, } ss.
EASTERN DIVISION.

I, B. C. MILLER, Clerk of the District Court of the United States, within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original "Order for Final Decree" entered upon the Journal of the proceedings of said Court in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

WITNESS, my official signature, and the seal of said Court at Cleveland, in said District, this 5th day of November, A. D. 1913, and in the 138th year of the Independence of the United States of America.

B. C. MILLER,
Clerk.

By ANNA H. ELLIOTT,
Deputy Clerk.



Circuit Court of the United States

WESTERN DISTRICT OF NEW YORK

NATIONAL BISCUIT COMPANY
Complainant,

vs.

WILLIAM DEININGER, HENRY E. DEIN-
INGER, LOUIS C. DEININGER and
FREDERICK C. J. DEININGER, co-
partners, and doing business under the
firm name and style of DEININGER
BROTHERS,

Defendants.

IN EQUITY

DECREE AND INJUNCTION

CHARLES K. OFFIELD
ADELBERT MOOT
EARL D. BABST

For Complainant.

FREDERICK F. CHURCH

For Defendants.



FINAL DECREE.

UNITED STATES CIRCUIT COURT.

Western District of New York.

National Biscuit Company,	} Final Decree.
<i>vs.</i>	
William Deininger, Henry E.	
Deininger, Louis C. Deininger,	
and Frederick C. J. Deininger,	
copartners and doing business	
under the firm name and style	
of Deininger Brothers.	

This cause coming on to be heard upon the pleadings as filed, Mr. Charles K. Offield appearing in behalf of the complainant and Mr. Frederick F. Church in behalf of defendants, and it appearing to the Court that said defendants do not desire further to contest or defend this action, but admit the truth of the allegations in the bill of complaint; and the said defendants have tendered and paid the costs to the date of this cause as taxed by the clerk, and also have settled and paid the damages caused to complainant by the commitment of the unlawful acts as set forth in the bill of complaint; and that no remaining question is presented except the matter relating to the granting of an injunction. It is therefore ordered, adjudged and decreed that an injunction issue under and in accordance with the allegations of, and the prayer of, the bill of complaint filed herein, and that this decree and order be, and is final.

JOHN R. HAZEL,
U. S. J.

Endorsed: Circuit Court of U. S., Western Dist. of N. Y., National Biscuit Company *agst* William Deininger *et al.* Final Decree. Adelbert Moot, Counsel for plaintiff, 45 Erie County Savings Bank Building, Buffalo, N. Y., U. S. Circuit Court, Western Dist. of N. Y. Filed Jul. 30, 1901. Harris S. Williams, Clerk.

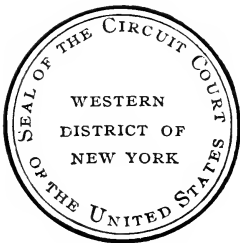
UNITED STATES OF AMERICA, }
WESTERN DISTRICT OF NEW YORK. } ss.

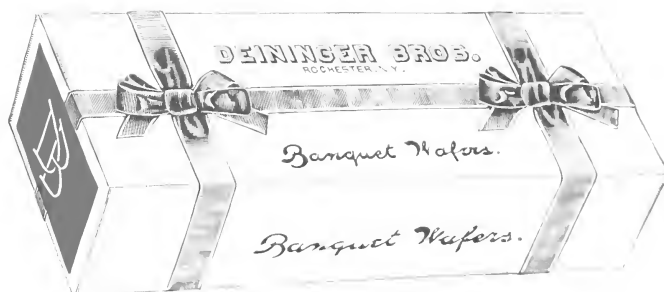
I, Harris S. Williams, Clerk of the Circuit Court of the United States, for the Western District of New York, do hereby certify that I have compared the annexed copy of Final Decree in re National Biscuit Company *vs.* William Deininger *et al.* with the original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

And I further certify that I am the officer in whose custody it is required by law to be.

In Testimony Whereof, I have caused the seal of the said court to be affixed at the City of Buffalo, in said District, this 27th day of May, A. D. 1904.

HARRIS S. WILLIAMS,
Clerk.





INJUNCTION.

UNITED STATES OF AMERICA, }
WESTERN DISTRICT OF NEW YORK. } ss.

The President of the United States, to William Deininger, Henry E. Deininger, Louis C. Deininger and Frederick C. J. Deininger, and each of them, and their and each of their servants, agents, and employes and all claiming or holding through or under them, Greeting:

WHEREAS, the National Biscuit Company has lately exhibited its bill of complaint against the said William Deininger, Henry E. Deininger, Louis C. Deininger and Frederick C. J. Deininger, copartners and doing business under the firm name of Deininger Brothers, as defendants, in the Circuit Court of the United States for the Western District of New York, before the Judges of said Court, praying to be relieved touching the matters therein complained of; and

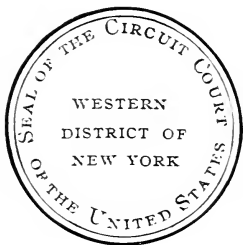
WHEREAS, by a final decree of said court made on the 30th day of July, 1901, it was ordered that a writ of injunction issue under the seal of said Court under and in accordance with the allegations of, and the prayer of said bill of complaint.

Now, THEREFORE, in consideration of the premises you, the said William Deininger, Henry E. Deininger, Louis C. Deininger and Frederick C. J. Deininger, and each of you, and your, and each of your, servants, agents and employes, and all claiming or holding through or under you or them, are hereby strictly commanded and enjoined under the pains and penalties which may fall upon you

and each of you in case of disobedience, that you and each of you, do absolutely desist and abstain, forthwith and forever, from the manufacture, use or sale of bakery products containing the complainant's ribbon-tying trade-mark, label, and design, upon any carton for bakery products having a wrapper or label thereon simulating the ribbon-tying design and effect disclosed by complainant's wrapper and label, and do absolutely desist and abstain forthwith and forever from manufacturing, using or selling labels or cartons in, or for, or with, bakery products containing the red end seal, sign or symbol of complainant, having therein circular and straight white lines arranged practically at right angles to each other; and from in any manner whatsoever, handling, advertising, or selling bakery products or packages containing thereon complainant's trade-marks or imitation or simulation thereof, or from using complainant's said trade-marks or packages or any imitation thereof upon any wrapper, package, box or carton, or by any means that may be adopted in the sale of their bakery products of any description; or any imitation of complainant's said trade-marks or packages, labels or wrappers that may be in any way calculated to deceive or mislead, and otherwise do absolutely desist and abstain, forthwith and forever, in every way, from fraudulently using complainant's trade-marks, packages, labels or wrappers, or any imitation or simulation thereof, in the sale of bakery products, or from violating or infringing the equitable rights of complainant in the premises herein complained of and set forth.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, at the City of Buffalo, N. Y., in said district, this 5th day of February,

one thousand nine hundred and two, and of our Independence, the one hundred and twenty-sixth.



HARRIS S. WILLIAMS,
Clerk.

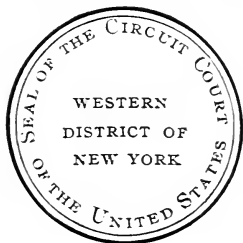
OFFIELD, TOWLE & LINTHICUM,
Solicitors for Complainant.

UNITED STATES OF AMERICA, } ss.
WESTERN DISTRICT OF NEW YORK. }

I, Harris S. Williams, clerk of the Circuit Court of the United States, for the Western District of New York, do hereby certify that I have compared the annexed copy of Injunction in re National Biscuit Co. *vs.* William Deininger *et al.* with the original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

And I further certify that I am the officer in whose custody it is required by law to be.

In Testimony Whereof, I have caused the seal of the said court to be affixed at the City of Buffalo, in said District, this 27th day of May, A. D. 1904.



HARRIS S. WILLIAMS,
Clerk.

Circuit Court of the United States

NORTHERN DISTRICT OF ILLINOIS

NORTHERN DIVISION

NATIONAL BISCUIT COMPANY
Complainant,
vs.

DAKE CRACKER COMPANY, J. A. BER-
NARD HOSSACK, WILLIAM P. FEN-
NELL and ABEL L. ALLEN,
Defendants.

} IN EQUITY

OPINION, INJUNCTION AND ORDER
MAKING INJUNCTION PERPETUAL

OFFIELD, TOWLE & LINTHICUM
EARL D. BABST

For Complainant.

W. P. FENNELL

For Defendants.

OPINION.

IN THE UNITED STATES CIRCUIT COURT,
NORTHERN DISTRICT OF ILLINOIS, } No. 26,043.
NORTHERN DIVISION.

KOHLSAAT, District Judge.

This matter comes on for hearing upon complainant's motion for a preliminary injunction restraining defendant corporation and the individual defendants from the use of the word "Dake" either alone or in connection with other words, upon or with reference to crackers or other bakery products.

I am of the opinion that the moving papers establish the property right in complainant to the use of the word "Dake" in connection with bakery products. Several defenses are interposed among which is that of abandonment. This I consider an affirmative defense, the burden of establishing which is upon defendants. The affidavits on this point are conflicting, but I deem the showing as to continued, though diminished, use by complainant, not overcome by defendants' affidavits.

The other defenses I do not think available.

A preliminary injunction may be entered, restraining defendants from using the word "Dake" in connection with bakery products, either alone or with prefixes or suffixes.

See *International Silver Co. v. Rogers Co. et al.*, 110 Fed., 955.

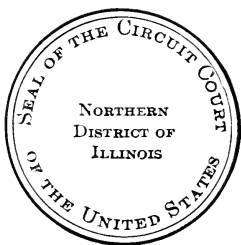
(Endorsed) Filed May 25, 1904, Marshall E. Sampsell, Clerk.

NORTHERN DISTRICT OF ILLINOIS, }
 NORTHERN DIVISION. } ss.

I, Marshall E. Sampsell, Clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the Opinion, filed in said Court on the 25th day of May A. D. 1904, in the cause wherein National Biscuit Company is the complainant and Dake Cracker Co. et al. are the defendants as the same appears from the original records thereof now remaining in my custody and control.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 26th day of May, A. D. 1904.

MARSHALL E. SAMPSELL,
Clerk.



INJUNCTION.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS,
NORTHERN DIVISION. } ss.

THE UNITED STATES OF AMERICA,

To Dake Cracker Company, a corporation, and J. A. Bernard Hossack, William P. Fennell and Abel L. Allen, doing business jointly with and as officers and managers of Dake Cracker Company, and to your Counselors, Attorneys, Solicitors, Trustees, Agents, Clerks, Employes, Servants and Workmen, and to each and every of you, Greeting:

WHEREAS, it hath been represented to the Judges of our Circuit Court of the United States for the Northern Division of the Northern District of Illinois in Chancery sitting, on the part of National Biscuit Company, complainant in its certain bill of complaint, exhibited in our said Circuit Court, on the Chancery side thereof, before the Judges of said Court, against you, the said Dake Cracker Company, a corporation, and J. A. Bernard Hossack, William P. Fennell and Abel L. Allen, doing business jointly with and as officers and managers of Dake Cracker Company, to be relieved touching the matters complained of. In which said bill it is stated, among other things, that you are combining and confederating with others to injure the complainant touching the matters set forth in said bill, and that your actings and doings in the premises are contrary to equity and good conscience. And it being ordered that a Writ of Preliminary Injunction issue out of said Court, upon said bill, enjoining and restraining you, and each of you, as prayed for in said bill; We, therefore, in consideration

thereof, and of the particular matters in said bill set forth, do strictly command you, the said Dake Cracker Company, a corporation, and J. A. Bernard Hossack, William P. Fennell and Abel L. Allen, doing business with and as officers and managers of Dake Cracker Company, your Counselors, Attorneys, Solicitors, Trustees, Agents, Clerks, Employes, Servants and Workmen, and each and every of you, that you DO ABSOLUTELY DESIST AND REFRAIN FROM in any manner whatsoever, manufacturing, handling, using, selling or advertising the bakery products all packages containing thereon, or in connection therewith your orator's said trade-mark or name, or any imitation or simulation thereof; also, from using your orator's trade name or mark on any package of any description, or any simulation or imitation thereof, upon any wrapper, box, carton, or barrel, or by any means whatsoever that may be adopted in the sale of bakery products of any description, that may be in any way calculated to deceive and otherwise enjoining and restraining in every way the said defendant from fraudulently using said trade-mark, or trade name, or any simulation or imitation thereof in the manufacture, use or sale of bakery products, or from violating or infringing the equitable rights of your orator in the premises herein complained of and set forth, or from using the word "Dake" in connection with bakery products, either alone or with prefixes or suffixes, until this Honorable Court, in Chancery sitting, shall make other order to the contrary. Hereof fail not, under the penalty of what the law directs.

To the Marshal of the Northern District of Illinois, to execute and return in due form of law.

WITNESS The HON. MELVILLE W. FULLER, Chief Justice of the United States of America, at Chicago, in said District, this 30th day of December, in the year of our Lord

one thousand nine hundred and one and of our Independence the one hundred and twenty-sixth year.

S. W. BURNHAM,
Clerk.



NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION. }

I, S. W. Burnham, Clerk of the Circuit Court of the United States, for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of an Injunction Writ issued out of this Court on the 30th day of December, A. D. 1901, in the cause wherein the National Biscuit Company is the complainant and the Dake Cracker Company et al. are the defendants, as the same appears from the original issued out of and under the seal of this Court.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 30th day of December, A. D. 1901.

S. W. BURNHAM,
Clerk.



ORDER MAKING INJUNCTION PERPETUAL.

CIRCUIT COURT OF THE UNITED STATES, }
 NORTHERN DISTRICT OF ILLINOIS, }
 NORTHERN DIVISION.

May 28, 1902.

Present, Hon. Christian C. Kohlsaat, District Judge.

National Biscuit Company	} 26,043. In Equity. Bill for Infringement of Trade Name, etc.
<i>vs.</i>	
Dake Cracker Company and J. A. Bernard Hossack.	

This cause coming on to be heard this 28th day of May, 1902, upon the pleadings as filed, Messrs. Offield, Towle & Linthicum, attorneys for and appearing in behalf of said complainant, the National Biscuit Company, and Mr. W. P. Fennell, attorney for and appearing in behalf of the defendant; and it appearing to the Court that said defendants do not desire further to contest or defend this action, and admit the truth of the allegations of the bill of complaint; and that said defendants have tendered and paid the costs in this action as taxed by the clerk, and have also settled for and paid to complainant the damages caused to plaintiff by the commitment of the unlawful acts as set forth in the bill of complaint, and that no remaining question is presented except and relating to the matter of the granting of the injunction therein.

It is therefore ordered, adjudged and decreed that the preliminary injunction heretofore granted in this case is hereby made perpetual, and that this decree and order be, and is, final.

NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION. }

I, Marshall E. Sampsell, Clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the order entered of record in said Court on the 28th day of May, A. D. 1902, in the cause wherein National Biscuit Company is the complainant and Dake Cracker Company et al. are the defendants, as the same appears from the original records thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said District, this 26th day of May, A. D. 1904.

MARSHALL E. SAMPSELL,
Clerk.



Circuit Court of the United States

MIDDLE DISTRICT OF PENNSYLVANIA

NATIONAL BISCUIT COMPANY
Complainant,

vs.

LAWRENCE WALTER
Defendant.

} IN EQUITY

ORDER, INJUNCTION AND DECREE

CHARLES K. OFFIELD

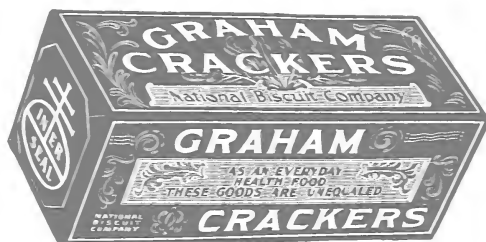
EARL D. BABST

H. C. REYNOLDS

For Complainant.

S. J. STRAUSS

For Defendant.



UNITED STATES CIRCUIT COURT, }
MIDDLE DISTRICT OF PENNSYLVANIA. }

National Biscuit Company, }
 Complainant, } In Equity.
 vs. } Motion for Injunction.
Lawrence Walter, }
 Defendant. }

INJUNCTION ORDER.

This cause coming on to be heard upon the 21st day of May, A. D. 1902, at 10 o'clock A. M., upon motion for injunction as filed, and upon the pleadings and affidavits filed herein, Messrs. Charles K. Offield and H. C. Reynolds, solicitors and of counsel for the motion, and S. J. Strauss for the defendant, the court having duly considered the same,

And it appearing to the court, from a bill of complaint, exhibits and affidavits filed herein, that the motion should be granted:

It is, therefore, ORDERED, ADJUDGED AND DECREED that a preliminary injunction issue under, and in accordance with the allegations of, and the prayer of the bill of complaint filed herein, to continue in effect until the next term of this court.

R. A. ARCHBALD,
 District Judge.

INJUNCTION.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, }
MIDDLE DISTRICT OF PENNSYLVANIA. } ss.

THE UNITED STATES OF AMERICA,

To Lawrence Walter, and to your Counselors, Attorneys, Solicitors, Trustees, Agents, Clerks, Employes, Servants and Workmen, and to each and every of you, Greeting:

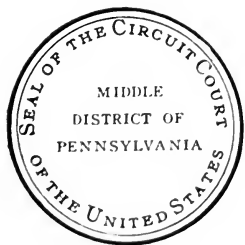
WHEREAS, It hath been represented to the Judges of our Circuit Court of the United States for the Middle District of Pennsylvania in Chancery sitting, on the part of National Biscuit Company, complainant in its certain bill of complaint, exhibited in our said Circuit Court, on the Chancery side thereof, before the judges of said court, against you, the said Lawrence Walter to be relieved touching the matters complained of. In which said bill it is stated, among other things, that you are combining and confederating with others to injure the complainant touching the matters set forth in said bill, and that your actings and doings in the premises are contrary to equity and good conscience. And it being ordered that a Writ of Preliminary Injunction issue out of said court, upon said bill, enjoining and restraining you, and each of you, as provided for in said bill; We, therefore, in consideration thereof, and of the particular matters in said bill set forth, do strictly command you, the said Lawrence Walter, your Counselors, Attorneys, Solicitors, Trustees, Agents, Clerks, Employes, Servants, and Workmen and each and every of you, that you do ABSOLUTELY DESIST AND REFRAIN FROM the manufacture, use or sale of cartons or packages, or bakery products, contained in cartons, having thereon a red label or wrap-

per simulating the red label wrapper of complainant; and do absolutely desist and restrain from the manufacture, use, or sale of cartons or packages containing bakery products, having thereon a red label or wrapper, with accompanying markings complained of; or from, in any manner whatever, advertising or selling bakery products or packages having thereon, substantially, complainant's red label or wrapper, or any marking or imitation thereof, or simulation thereof, that may be in any way calculated to, in any way, mislead or deceive; and otherwise do absolutely restrain from forthwith, in any other way, fraudulently using said complainant's red label wrapper upon cartons or packages, or in connection with the manufacture and sale of bakery products; or otherwise violating or infringing the equitable rights of complainant, as set forth and specified in complainant's bill of complaint, until this Honorable Court, in Chancery sitting, shall make other order to the contrary. Hereof fail not, under the penalty of what the law directs.

To the Marshal of the Middle District of Pennsylvania to execute, and return in due form of law.

WITNESS, the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Scranton, in said District, this 21st day of May in the year of our Lord one thousand nine hundred and two, and of our Independence the one hundred and twenty-sixth year.

A. J. COLBURN, JR.,
Deputy Clerk.



FINAL DECREE.

IN THE CIRCUIT COURT OF THE UNITED STATES.

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

National Biscuit Company.	} No. 7, October
Complainant,	
versus	
Lawrence Walter.	
Defendant.	} Term, 1902.
	} Bill for an In-
	} fringement, etc.
	} Unfair Competition.

This cause coming on to be heard upon the 23rd day of April, A. D. 1904, at ten o'clock A. M., upon the final pleadings, and proofs, and the Court being fully advised and having duly considered the same,

IT IS THEREFORE ORDERED, adjudged and decreed:

First: That the said complainant has good right and title in and to the red label or wrapper used by them in the manufacture and sale of cartons or packages of graham crackers, like or substantially like "Complainant's Exhibit, Complainant's Label and Wrapper Package," identified by complainant's bill of complaint and presented as an exhibit in this case.

Second: That the defendant has infringed and violated the right and title of said complainant, as above identified, by selling and purchasing and selling cartons or packages of graham crackers, having thereon a red label or wrapper like or substantially like complainant's red label or wrapper, and having thereon lettering and marking like or substantially like complainant's lettering and marking, upon complainant's exhibit, and as particularly shown by "Complainant's Exhibit, Defendant's Cartons or Packages," present as an exhibit in this case.

Third: That this cause be referred to Henry A.

Knapp, Esq., one of the Masters in Chancery in this Court, to take testimony and ascertain and report to this Court the profits accruing to the defendant, by reason of the commitment of the unlawful acts here found, and the damages accruing to the complainant, by reason of such acts, with full power to summon and command the attendance of the defendant for examination with all books and papers relevant to such examination, and to summon and command also the attendance of all witnesses having knowledge of facts relevant to the determination of questions involved in this issue of reference; and that the testimony heretofore taken in this cause shall be before said Master so far as relevant to this reference. Said Master to report to this Court his findings and conclusions thereon.

Fourth: That the preliminary injunction heretofore granted, and now in force, is hereby made perpetual, and the complainant have and recover from the defendant the costs in this case to be taxed, and have execution therefor.

R. A. ARCHBALD,
District Judge.

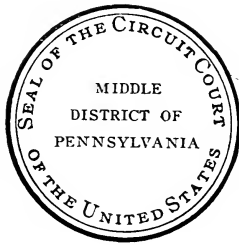
UNITED STATES OF AMERICA, }
MIDDLE DISTRICT OF PENNSYLVANIA. } set.

I, Edward R. W. Searle, Clerk of the Circuit Court of the United States of America, for the Middle District of Pennsylvania in the Third Circuit, do hereby certify that

the writings annexed to this certificate are true copies of their respective originals on file and now remaining among the records of said court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Scranton, this 31st day of May in the year of our Lord one thousand nine hundred and four and of the Independence of the United States the 128.

E. W. R. SEARLE,
Clerk of C. C.



Circuit Court of the United States

WESTERN DISTRICT OF NEW YORK

NATIONAL BISCUIT COMPANY
Complainant,

vs.

IRA SWICK

Defendant.

} IN EQUITY

STIPULATION FOR INJUNCTION,
OPINION AND DECREE

MOOT, SPRAGUE, BROWNELL & MARCY
OFFIELD, TOWLE & LINTHICUM
EARL D. BABST

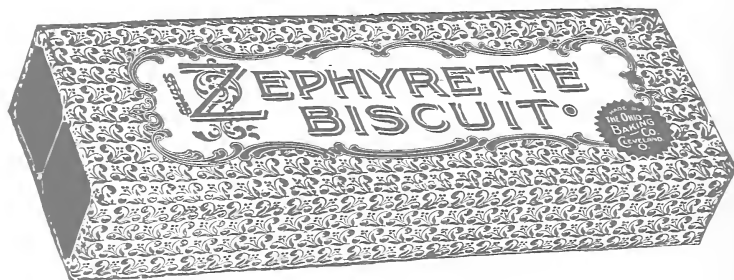
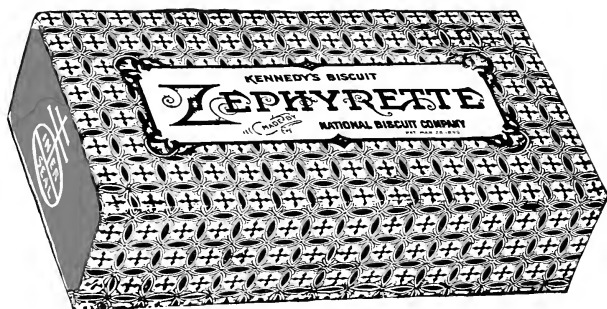
For Complainant.

BANNING & BANNING
BENJAMIN C. STARR

For Defendant.







STIPULATION FOR INJUNCTION.

CIRCUIT COURT OF THE UNITED STATES, WESTERN DISTRICT
OF NEW YORK.

National Biscuit Company, <i>Complainant,</i> <i>vs.</i> Ira Swick, <i>Defendant.</i>	} In Equity.
---	--------------

It is hereby stipulated and agreed by and between the above parties, by their counsel, respectively, that an injunction may be entered in the above entitled cause against the defendant enjoining him from using the "Long Branch Biscuit Ribbon-Tying" design, the trade-mark or name "Zephyrette," and the trade-mark or name "Excelsior" or "Excelsior Butter Cracker" as prayed for in the bill of complaint in the above entitled cause, but without costs, profits or damages to which the complainant might be entitled for the past, the same having been mutually agreed upon and arranged.

It is further stipulated and agreed that the Ohio Baking Company, manufacturer of the cartons and packages sold by the defendant containing the above mentioned trade-marks, names or designs, shall cease and discontinue the use of each of the above trade-marks, names or designs on or before the First day of January, 1902, and in consideration thereof the complainant hereby releases and quit claims under said agreement and arrangement the said Ohio Baking Company from any and all claim

for damages or profits which it might have against said Company on account of its use prior to January 1, 1902, of each of said trade-marks, names or designs whether used on packages, sold to the defendant herein or others.

OFFIELD, TOWLE & LINTHICUM,

Solicitors for Complainant.

BANNING & BANNING,

Solicitors for Defendant.

(United States Circuit Court, Western Division New York. March 17, 1903.)

No. 134.

1. TRADE-MARKS—INFRINGEMENT.

A technical trade-mark, although not a facsimile of another, may be so used by a rival manufacturer as to imitate another's trade-mark, and, when such use actually deceives the public, it constitutes an infringement, against which a court of equity will grant relief.

2. SAME.

Complainant used and registered a trade-mark consisting of a square label or seal of a vivid red color, with the corners clipped, on which was an arbitrary combination of straight and curved lines in white, in which were printed the letters and word "In-er-seal." These labels were placed on the ends of complainant's cartons containing bakery products. Another manufacturer of the same class of goods, registered as a trade-mark, and used in the same manner on its cartons, a label the same in size, shape, and color, having thereon a combination of white lines consisting of circles and straight lines with the words "Factory" and "Seal" printed thereon. The figure or symbol was not the same, but the general effect of the combination in a label used in the same place on a carton of the same size, shape, and color, together with a similar figure and the word "Seal," was to simulate the trade-mark of complainant, and to deceive purchasers. Held, that such use of defendant's trade-mark was an infringement of that of complainant, which entitled it to an injunction.

In Equity. Suit for infringement of trade-mark. On final hearing.

Moot, Sprague, Brownell & Marey, Offield, Towle & Linthicum, and Earl D. Babst (Charles K. Offield, of counsel), for complainant.

Banning & Banning and Benjamin C. Starr, for defendant.

HAZEL, District Judge. The bill as originally filed, charges the defendant with unlawful infringement of a trade-mark and five trade-names used by complainant upon its various bakery products. A stipulation was filed before answer, admitting infringement by defendant as to five of the trade-names. Accordingly a decree was entered by con-

sent of all parties restraining and enjoining the future use of such trade-names by the defendant. The alleged infringement by the defendant of complainant's "In-er-seal" registered trade-mark No. 35,108, dated September 18, 1900, is now the sole and specific subject for judicial determination.

COMPLAINANT'S TRADE-MARK.



DEFENDANT'S TRADE-MARK.



The defendant's infringement consists in the use of the registered trade-mark No. 35,597, dated December 13, 1900, issued to the Ohio Baking Company.

The proofs show that complainant manufactures various kinds of bakery products, which it places upon the market in special and distinct sizes of cartons or packages. Such cartons and packages widely vary in form and coloring, and are lettered on their sides in different size type. Upon the ends of each package or carton is applied the trade-mark printed upon a square label or seal, clipped at the corners, in clear white lines upon a vivid red background. The proofs further show that the trade-mark seal has since its adoption regularly been applied to the ends of the cartons in the manner described, except in a few instances. Complainant contends that its product has

become well known to the general public because of the peculiarly quaint configuration of its trade-mark, which is uniquely displayed. The bill charges the adoption of the trade-mark on or about the month of March, 1899, and its subsequent registration in the office of the Commissioner of Patents May 12, 1900. It is specifically described as—

“An arbitrarily-selected design or symbol representing an oval-shaped figure separated centrally and horizontally in the direction of its greatest length by a bar, from which there rises centrally and at right angles thereto a perpendicular bar, which near its upper end is intersected by double horizontal cross-bars, thus forming what might be designated as a ‘double-T-shaped’ figure or cross-tree, while with said oval-shaped section and above the horizontal dividing-bar and to the left of the perpendicular intersecting bar appear the letters ‘I N,’ and on the opposite side of said perpendicular intersecting bar appear the letters ‘E R,’ the lower section of said oval-shaped figure having therein the word ‘Seal.’ ”

The specification describes and the drawings show the design as applied upon a rectangular background, the corners thereof being clipped or irregular. The specification states a preference for the employment of a bright red or orange-colored background in connection with the trade-mark design with the figures and lines printed in white. The specification further says that the purpose and object of the peculiarity of the design is to produce a conspicuous effect, securing the greatest possible prominence. The design is usually printed on the labels attached to the ends of the cartons or packages containing complainant’s product. This arbitrary and fanciful designation was first appropriated by complainant as a trade-mark for its bakery product, and it is, therefore, entitled to protection from infringement. It quite clearly appears from the evidence that complainant’s trade-mark has been extensively advertised at large expense throughout the United States

and in the locality where the defendant carries on his business of selling bakery products, and where the alleged infringing trade-mark is asserted to have been fraudulently used. The defendant is a dismissed employe of the complainant. He was well acquainted with complainant's customers in the territory where the alleged infringements were committed. Soon after his dismissal from complainant's employ, he commenced to divert the trade of complainant by introducing the bakery product of a competitive manufacturer, and finally simulated complainant's trade-mark, as a result of which his sales increased. Defendant's bakery product is manufactured by the Ohio Baking Company, and is put upon the market wrapped up in carton form, sealed at the ends, and having a vivid red rectangular label at each end, clipped at the corners. Upon the seals or square labels is imprinted in distinctive white lines the registered trade-mark of the Ohio Baking Company, above set forth. The labels upon which is printed the infringing device as to color, size, and irregular shape are in similitude of complainant's labels or seals. The configuration of the infringing trade-mark consisting of curved and straight lines, flaring at the ends in resemblance of complainant's lines, is more particularly described in the specification as consisting of three parallel vertical bars and central cross-bar and two circles arranged in the manner shown by the figure itself. Defendant claims that the Ohio Company trade-mark really consists of a fanciful monogram of the word "Ohio," and that he has the right to use it in any size, shape, and color. Prominently appearing in defendant's label are the words "Factory" at the upper end and "Seal" at the lower end. This also would appear to be in simulation of the word "In-er-seal" printed on complainant's device. The packages or cartons of both complainant and defendant have

printed matter upon their sides, indicating the character of their contents and the name of the manufacturer. The form of the package and style of type and color of wrapper are concededly the property of the public, as, indeed, are the labels clipped at the corners having a bright red background. No point is made to any similitude of cartons, style, or color of print, nor even of the separate features of complainant's trade-mark. The defendant contended generally on argument that the specifically defined trade-mark of complainant as to its general features and characteristics must be interpreted as limiting its scope to that which is actually described. If this contention means that complainant is restricted to the use of the trade-mark, and has obtained no exclusive right in the collocation of its parts and the distinguishing features by which the trade-mark has become known to the public, such contention is without merit. The gist of the complaint is a violation of a trade-mark, which is composed of a peculiar configuration of lines and a combination of other features. In other words, the distinguishing characteristics of the trade-mark consist in the circles and straight lines in relation to each other, and printed upon the label in white and upon a vivid red background. In the case of *Lalance & Grosjean Mfg. Co. v. National Enameling & Stamping Co. (C. C.)*, 109 Fed. 317—a case of unfair competition—it was held that no one can have a trade-mark monopoly of any color of paper, or any shape of label, or any color of ink, or any one or other detail, yet the general collocation of such details will be protected. The sole question, therefore, is whether the defendant's design for a trade-mark imprinted on a vivid red background in simulation of complainant's design is fairly within complainant's asserted exclusive scope. That complainant's trade-mark and manner of displaying the

same attracts the public attention cannot be successfully disputed. Undoubtedly, complainant's manufactured product has become extensively known to the public solely by its peculiar trade-mark. I have no doubt that an intending purchaser of complainant's product using ordinary care is attracted to the arbitrary trade-mark design, and not to any printed words on the sides of the packages, or even to the nomenclature of the manufacturer of the product. When both designs were exhibited on the hearing, I became well satisfied that defendant's device and manner of applying it in combination with the other features are in imitation of complainant's. Such resemblance tends to deceive an ordinary purchaser giving the usual attention, and causes him to purchase the one believing it to be the other. Although defendant's device and configuration is not in strict resemblance to complainant's, yet force is given to the impression which I obtained on the hearing because of the adoption by defendant of a bright red background and a label clipped at the corners of corresponding size to that of complainant. The record discloses that the trade-mark seal of the defendant and the manner of displaying it upon the ends of cartons and packages is likely to deceive the ordinary purchaser into the belief that he was purchasing the product of complainant. By the testimony of defendant's witness Gaiser, a grocer, it appears that an intending purchaser must make a close examination of both packages in order to distinguish defendant's packages and cartons from complainant's. The witness was unable at the hearing, when both packages were exhibited to him, to discover much difference, and was compelled to look for the name of the manufacturer to distinguish the product of complainant from that of defendant. Other evidence was given by complainant upon the hearing showing the sim-

ilitude of the respective trade-marks to be such as to deceive the public into buying the bakery product of defendant under the impression that they are buying those of complainant. Irrespective, however, of such proof, the trade-mark imprinted upon a bright red-colored label, clipped at the corners, and of corresponding size to complainant's is alone calculated to deceive, and must be regarded as an infringement of complainant's rights secured by its registered trade-mark. Specific proof of purchases by individuals actually deceived under such circumstances appears not to be necessary. *Cleveland Stone Co. v. Wallace* (C. C.), 52 Fed. 431; *National Biscuit Co. v. Baker* (C. C.), 95 Fed. 135; *Von Mumm, v. Frash* (C. C.), 56 Fed. 830. In the controversy it is immaterial that the size of cartons, color of wrapper, size and kind of label, and separate features of complainant's trade-mark are old, and may, therefore, be used by any one. The complainant's trade-mark, its features of coloring, rectangular labels, white lines on a vivid background, manner of displaying the arbitrary designation at the ends of the packages, all in combination, are peculiarly distinguishing marks for its goods. I am well satisfied that a technical trade-mark, although not a fac-simile of another, may, nevertheless, be so used by a rival manufacturer as to imitate another's trade-mark, and when such use actually deceives the public a court of equity will afford relief. *Scheuer v. Muller*, 20 C. C. A. 161, 74 Fed. 225; *Draper v. Skerrett* (C. C.), 94 Fed. 912. I have examined the case of *Richter v. Anchor Remedy Co.* (C. C.), 52 Fed. 455, and other cases cited by counsel, but such cases are either not in point or do not disturb the conclusion reached. By the manner of defendant's use of the Ohio Baking Company's trade-mark he obtains a benefit to which he is not entitled. He appropriates the good will

of a rival business by purloining his rival's method of dressing his vendible goods. *City of Carlsbad v. Schultz* (C. C.), 78 Fed. 471; *Sprague Elec. Ry. & Motor Co. v. Nassau Elec. Ry. Co.*, 37 C. C. A. 286, 95 Fed. 821. As Judge Wanty said when the case against the Ohio Baking Company was before him on application for preliminary injunction, "Why does the defendant use the exact shade of red used by complainant?" Further inquiry is pertinent. Why white letters of substantially the same type? Why labels of uniform size, and with clipped corners? Other questions of like kind may be propounded. The record discloses no satisfactory answer, and therefore it is manifest that the defendant deliberately and fraudulently imitates the trade-mark of complainant, and in that manner designs to palm off his goods for those of complainant.

The complainant may have a decree, with costs, enjoining the defendant from imitating or simulating complainant's "In-er-seal" trade-mark, as set out in this opinion. So ordered.

121 Fed. Rep. 1007.

FINAL DECREE.

UNITED STATES CIRCUIT COURT, }
 WESTERN DISTRICT OF NEW YORK. }

National Biscuit Company, <i>Complainant,</i> <i>vs.</i> Ira Swick, <i>Defendant.</i>	}	<i>Bill for Infringement of Trade-mark. Decree.</i>
---	---	---

This cause coming on to be heard upon pleadings and full proof, and having been fully argued by counsel respectively, for both parties litigant: Mr. Charles K. Offield, Mr. Adelbert Moot, and Mr. Earl D. Babst, for complainant; Messrs. Banning & Banning, and Mr. Benjamin C. Starr, for defendant; and the court being fully advised, and having duly considered the same, orders, adjudges and decrees:

First: That the said complainant, the National Biscuit Company's In-er-seal Trade-mark is a good and valid Trade-mark, and the complainant has full and unquestioned title thereto and therein, as alleged in the bill of complaint filed herein.

Second: That the said defendant, Ira Swick, has infringed upon and violated said complainant's In-er-seal trade-mark, as alleged in said bill of complaint.

Third: That the said defendant, his agents, servants, attorneys, and employes be, and hereby are enjoined from applying or using complainant's In-er-seal trade-mark in any manner whatsoever, upon, or in connection with, bakery products; or in any manner whatsoever, handling, selling, or advertising bakery products, or packages, or cartons containing bakery products having thereon complainant's said trade-mark, or any imitation or simulation thereof.

Fourth: That the said complainant has the right to recover any and all damages accruing to, or arising out of said unlawful violation and infringement of said trademark by said defendant, together with the cost herein to be taxed; and that this cause be referred to George P. Keating, he being a suitable person as Master of this Court, to take, state and report an account of such damages under and in accordance with this decree, and that upon said accounting the testimony heretofore taken by either party in this cause may be read by either party, and considered by the Master.

JOHN R. HAZEL,
U. S. J.

Endorsed: U. S. Circuit Court, Western District of New York. In Equity. National Biscuit Company vs. Ira Swick. Decree. U. S. Circuit Court, Western Dist. of N. Y. Filed Mar. 28, 1903. Harris S. Williams, Clerk.

UNITED STATES OF AMERICA, }
WESTERN DISTRICT OF NEW YORK.} ss.

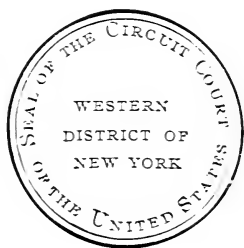
I, Harris S. Williams, Clerk of the Circuit Court of the United States, for the Western District of New York, do hereby certify that I have compared the annexed copy of Decree with the original entered and on file in this office,

and that the same is a correct transcript therefrom, and of the whole of said original.

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of Buffalo, in said District, this 6th day of April, A. D. 1903.

HARRIS S. WILLIAMS,
Clerk.



Circuit Court of the United States

SOUTHERN DISTRICT OF NEW YORK

NATIONAL BISCUIT COMPANY
a corporation

Complainant,

vs.

HENRY PUNCHARD, Sr., and HENRY
PUNCHARD, Jr., co-partners, doing
business as HENRY PUNCHARD &
SON,

Defendants.

IN EQUITY

DECREE AND INJUNCTION

EDMUND WETMORE
CHARLES K. OFFIELD
EARL D. BABST

For Complainant.

JOHN A. MAPES

For Defendants.





FINAL DECREE.

UNITED STATES CIRCUIT COURT,
Southern District of New York.

National Biscuit Company, a corporation, Complainant, vs. Henry Punchard, Sr., and Henry Punchard, Jr., co-partners, doing business as Henry Punchard & Son. Defendants.	}
--	---

This cause coming on to be heard under the pleadings as filed, and Mr. Edmund Wetmore, Mr. Earl D. Babst and Mr. Charles K. Offield, appearing in behalf of the complainant, and Mr. John A. Mapes in behalf of the defendants, and it appearing to the Court that the said defendants do not desire to further contest this action, but have made a certain settlement of the same and assented as follows:

(1) That the said complainant is the rightful and exclusive owner of the trade-name "Uneeda" or "Uneeda Biscuit" as alleged in said bill of complaint, and is the rightful and exclusive owner of the trade-mark "In-er-seal", consisting of a vivid red background, square in shape with uniform clipped corners having white line markings thereon and applied to each end of the bakery cartons or packages with a marginal exposure surrounding the same, and is the rightful and exclusive owner of the wrapper application, word collocation and decorative appearance of the wrapper surrounding and enclosing said carton or package, as appears by complainant's exhibits filed herewith.

(2) That the said defendants, Henry Punchard, Sr.,

and Henry Punchard, Jr., have infringed and violated these exclusive rights, trade-name, trade-mark and wrapper embellishment by the use upon such cartons of the words "Ulika Biscuit," as appears upon the sides of defendants' cartons, and of the bright red seal upon the ends thereof with white line accompanying markings thereon and by the wrapper simulation of complainants, as appears by "Complainant's Exhibit Defendants' Infringing Carton" filed herein.

(3) That the Manhattan Biscuit Company, a corporation organized under the laws of the State of New Jersey, etc., puts up, makes and sells the infringing cartons with the wrapper accompaniment as disclosed by the defendants' carton, and instigated and authorized the commitment of the infringing acts above found.

(4) That the defendants having settled for the damages and profits suffered by the complainant and accruing to the defendants by reason of these infringing acts, no reference to a master for an accounting is made, but it is—

ORDERED, ADJUDGED AND DECREED that a perpetual injunction issue as prayed for in the bill of complaint in the manner and to the extent demanded in the fourth subdivision of the prayer for relief contained in the complainant's bill of complaint and that the defendants pay the taxable court costs in this action and in default thereof that execution issue therefor.

Dated New York, November 3, 1904.

E. HENRY LACOMBE,
U. S. Circuit Judge.

I hereby consent to the entry of the above decree.

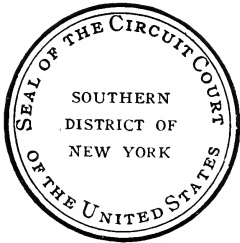
JOHN A. MAPES,
Defendants' Solicitor.

We hereby consent to the entry of the above decree.

EARL D. BABST,
OFFIELD, TOWLE & LINTHICUM,
Complainant's Solicitors.

EDMUND WETMORE,
CHARLES K. OFFIELD,
EARL D. BABST,
Of Counsel.

(Endorsed) United States Circuit Court, Southern District of New York. National Biscuit Co., Complainant, *vs.* Henry Punchard, Sr., *et al.*, Defendants. FINAL DECREE. Earl D. Babst & Offield, Towle & Linthicum, Solrs. for Complt., 34 Pine St., New York. U. S. Circuit Court, Southern District of New York, Filed Nov. 3, 1904, John A. Shields, Clerk.



A copy.

JOHN A. SHIELDS,
Clerk.

INJUNCTION.

THE PRESIDENT OF THE UNITED STATES OF
AMERICA,

*To Henry Punchard, Sr., and Henry Punchard, Jr.,
their clerks, attorneys, servants, agents and workmen,
and each and every of them, Greeting:*

WHEREAS, it has been represented to us in our Circuit Court of the United States for the Second Circuit and Southern District of New York, that the complainant, National Biscuit Company, is the rightful and exclusive owner of the trade-mark "Uneda" or "Uneda Biscuit," as alleged in the bill of complaint herein, and is the rightful and exclusive owner of the trade-mark "In-er-seal," consisting of a vivid red background square in shape with uniform clipped corners having white line markings thereon and applied to each end of the bakery cartons or packages, with a marginal exposure surrounding the same, and is the rightful and exclusive owner of the wrapper application, word collocation and decorative appearance of the wrapper surrounding and enclosing said carton or package, as appears by complainant's exhibits filed with said bill of complaint, and that the said defendants, Henry Punchard, Sr., and Henry Punchard, Jr., have infringed and violated these exclusive rights, trade-name, trade-mark and wrapper embellishment by the use upon such cartons of the words "Ulika Biscuit," as appears upon the sides of defendants' cartons, and of the bright red seal upon the ends thereof with white line accompanying markings thereon, and by the wrapper simulation of complainant;

NOW, THEREFORE, we strictly command and enjoin you, the said Henry Punchard, Sr., and Henry Punchard, Jr.,

and each of you, your servants, agents and employes, and all claiming or holding through or under you, under the penalties that may fall upon you in case of disobedience that you forthwith permanently and forever desist from in any manner whatsoever handling, advertising or selling the packages heretofore sold by defendants, complained of in the bill of complaint and hereinabove described, or making use of the word "Ulika" or "Ulika Bis-kit," or any word substantially like it or them, as the name or designation, or as a part of the name or designation connected with any biscuit upon any package used in the sale of biscuits, and from in any manner whatsoever making use of the word or words "Ulika" or "Ulika Bis-kit," or any other word substantially like it as the name or designation, or part of the name or designation upon any wrapper on any package of biscuits or crackers whatsoever; or from the use of said word or name upon any package or packages like those hereinabove described as the packages or cartons of said defendants, and in every way from making use in connection with the sale or advertisement of biscuit the words "Ulika" or "Ulika Bis-kit" upon any packages so nearly like your orator's package hereinbefore described as to be calculated to mislead, or from in any way using upon the ends of such packages or cartons a label or seal of red background with white line markings thereon, as shown upon the ends of defendants' packages herein complained of, or from advertising by picture representations your orator's said trade-names or trade-mark and wrapper ornamentation, as appears in "Complainant's Exhibit Defendants' Advertisement No. 1," and "Complainant's Exhibit Defendants' Poster Infringement No. 2," and from violating and infringing the rights of your orator in the premises as hereinbefore set forth.

WITNESS the Hon. Melville W. Fuller, Chief Justice of the United States at the City of New York, Borough of Manhattan, on the 5th day of November, 1904.

JOHN A. SHIELDS,
Clerk.



A copy.

JOHN A. SHIELDS,
Clerk.

Circuit Court of the United States

DISTRICT OF MARYLAND

NATIONAL BISCUIT COMPANY	}	IN EQUITY
<i>Complainant,</i>		
<i>vs.</i>		
HARGRAVE BISCUIT COMPANY, JOSEPH W. HARGRAVE, WILLIAM B. HARGRAVE, EPPS HARGRAVE, STEVEN J. VAN LILL and JAMES W. CHAPMAN, Jr.,		
<i>Defendants.</i>		

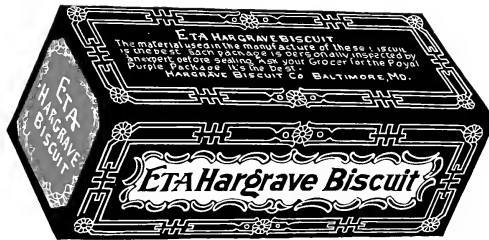
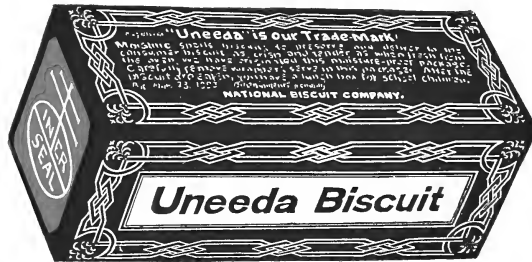
FINAL DECREE AND INJUNCTION

OFFIELD, TOWLE & LINTHICUM
Solicitors for Complainant.

W. IRVINE CROSS
EARL D. BABST
Of Counsel for Complainant.

GEORGE D. PENNIMAN
JAMES W. CHAPMAN, JR.
Solicitors for Defendants.





FINAL DECREE.

UNITED STATES CIRCUIT COURT,

District of Maryland.

<p>National Biscuit Company, <i>Complainant,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>Hargrave Biscuit Company, Joseph W. Hargrave, William B. Hargrave, Epps Hargrave, Steven J. Van Lill and James W. Chapman, Jr., <i>Defendants.</i></p>	}	<p><i>Bill for infringement of trade-mark, trade- name and unfair competition.</i></p>
--	---	---

This cause coming on to be heard upon the pleadings as filed, Mr. W. Irvine Cross, Earl D. Babst and Charles K. Offield appearing in behalf of the complainant, and Mr. George D. Penniman and James W. Chapman, Jr., in behalf of defendants.

And it appearing to the Court that said defendants do not desire further to contest or defend this action, and that said defendants have tendered and paid the costs to date in this action as taxed by the Clerk, and have also made settlement and paid damages and profits due the complainant by reason of the infringing acts set forth in the Bill of Complaint, and that no remaining question is open and present except the matter relating to the granting of an injunction.

It is therefore, this 19th day of October, 1905, ordered, adjudged and decreed that an injunction issue under and in accordance with the allegations of the Bill of Complaint and as identified by the prayer thereof, and that this decree and order be and is final.

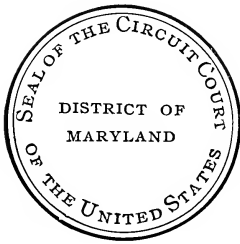
THOS. J. MORRIS,
Judge.

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, TO-WIT:

I, James W. Chew, Clerk of the United States Circuit Court for the District of Maryland, do hereby certify that the foregoing is a true copy of the Original Decree entered and filed in the therein entitled case in said Circuit Court, on the 19th day of October, 1905.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Circuit Court this 31st day of October, 1905.

JAS. W. CHEW,
Clerk of said Circuit Court.



INJUNCTION.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } ss.
DISTRICT OF MARYLAND.

THE UNITED STATES OF AMERICA,

To Hargrave Biscuit Company, Joseph W. Hargrave, William B. Hargrave, Epps Hargrave, Steven J. Van Lill and James W. Chapman, Jr., and to your counselors, attorneys, solicitors, trustees, agents, clerks, employees, servants and workmen, and to each and every one of you, Greeting:

WHEREAS, it has been represented to the Judges of our Circuit Court of the United States for the District of Maryland in Chancery sitting, on the part of the National Biscuit Company, complainant, in a certain Bill of Complaint, exhibited in our said Circuit Court, on the Chancery side thereof, before the Judges of said Court, against you, the said Hargrave Biscuit Company, Joseph W. Hargrave, William B. Hargrave, Epps Hargrave, Steven J. Van Lill and James W. Chapman, Jr., to be relieved touching the matters complained of. In which said bill it is stated, among other things, that you are combining and confederating with others to injure the complainant touching the matters set forth in said bill, and that your actings and doings in the premises are contrary to equity and good conscience.

And it being ordered that a writ of perpetual injunction issue out of said Court, upon said bill, enjoining and restraining you, and each of you, as prayed for in said bill; We, therefore, in consideration thereof, and of the particular matters in said bill set forth, do strictly command you, the said Hargrave Biscuit Company, Joseph W. Hargrave, William B. Hargrave, Epps Hargrave,

Steven J. Van Lill and James W. Chapman, Jr., your counselors, attorneys, solicitors, trustees, agents, clerks, employes, servants and workmen, and each and every of you, that you

DO ABSOLUTELY DESIST AND REFRAIN FROM, in any manner whatsoever handling, advertising or selling packages or cartons containing bakery products having upon the ends thereof any red seal with white line markings thereon, or red seal substantially like the Seal or Trade-Mark of your orator; or from making, using, selling or handling cartons like your orator's carton containing your orator's Trade-Name "UNEEDA BISCUIT" with wrapper accompaniment as shown in your orator's exhibit of the same, of the use of the word "BISCUIT" upon a white parallelogram, as shown in "Complainant's Exhibit Defendants' Infringing Carton," whether preceded by the words "Eta Hargrave Biscuit" or any other words associated therewith, or from the use of any wrapper application similar to or substantially like the wrapper application upon your orator's "UNEEDA BISCUIT" package; and from violating and infringing the rights of your orator in the premises, until this Honorable Court, in Chancery sitting, shall make other order to the contrary. Hereof fail not, under the penalty of what the law directs.

WITNESS, the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Baltimore, in said District, this 19th day of October, in the year of our Lord, one thousand nine hundred and five and of our Independence, the one hundred and thirtieth year.

JAMES W. CHEW, Clerk.

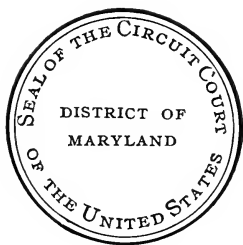


UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, To-Wit:

I, James W. Chew, Clerk of the United States Circuit Court for the District of Maryland, do ~~HEREBY~~ CERTIFY that the foregoing is a true copy of the Perpetual Injunction which was issued out of said Court in the case entitled National Biscuit Company vs. Hargrave Biscuit Company, *et al.*, in said Circuit Court on the 19th day of October, 1905.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said Circuit Court this 31st day of October, 1905.

JAS. W. CHEW,
Clerk of said Circuit Court.



Circuit Court of the United States

EASTERN DISTRICT OF MICHIGAN

NATIONAL BISCUIT COMPANY <i>Complainant,</i>	}	IN EQUITY No. 3898
<i>vs.</i>		
HAMMELL CRACKER COMPANY, and JAMES F. HAMMELL, SAMUEL DUMPHY and P. J. HAMMELL,		
<i>Defendants.</i>		

DECREE AND INJUNCTION

CHARLES K. OFFIELD
EARL D. BABST

Solicitors for Complainant.

THOMAS, CUMMINS & NICHOLS
Solicitors for Defendants.



FINAL DECREE.

At a session of the Circuit Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment, at the District Court Room, in the City of Detroit, on Friday the thirteenth day of October, in the year one thousand nine hundred and five.

Present: The Honorable Henry H. Swan, District Judge.

National Biscuit Company,	} No. 3898. In Equity.
vs.	
Hammell Cracker Company, and	
James F. Hammell, Samuel	
Dumphy and P. J. Hammell.	

This day came the above named complainant, the National Biscuit Company, by Mr. Earl D. Babst and Charles K. Offield, its Solicitors and of Counsel, and the defendants by Messrs. Thomas, Cummins & Nichols, their Solicitors and of Counsel, and it appearing to the Court that the defendants do not further desire to contest this action, and that they have settled with and paid to the complainant the damages, profits and costs arising out of this action and the acts complained of in the Bill of Complaint, and that there nothing remains as to this litigation, except as to the subject matter of injunction, and the entry of final decree so expressed herein, the defendant consenting thereto,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

First: That the complainant is the true, rightful originator and sole owner of a certain trade-mark, or symbol, consisting of a red end seal upon the ends of cartons or packages, containing bakery products, having a red background and white line markings thereon;

Second: That the defendants have infringed upon and violated the exclusive rights of the complainant by the use and application upon the ends of their cartons containing bakery products, of a red end seal with white line markings thereon;

Third: That the said defendants, Hammell Cracker Company, James F. Hammell, Samuel Dumphy and P. J. Hammell and each of them, and their respective agents, servants, and employes, and each of them, be and hereby are perpetually enjoined from affixing, using or applying, or causing to be affixed, used or applied, in any way, upon cartons or the ends of cartons containing bakery products, any red seal with white line markings thereon, or from using or applying upon the ends of their cartons, containing bakery products, any seal in simulation or imitation of complainant's red end seal, or "In-er-seal" trade-mark:

Fourth: It further appearing to this Court that the said defendants have settled and paid the complainant the damages to complainant and profits to the defendants arising out of the infringing acts complained of, and also paid to the complainant the costs in this case, no reference to the Master for any purpose is therefore made in this case, and this decree as entered, is to be, and stand, as final.

UNITED STATES OF AMERICA, } ss.
EASTERN DISTRICT OF MICHIGAN. }

I, Walter S. Harsha, Clerk of the Circuit Court of the United States for the Eastern District of Michigan, do hereby certify that the above and foregoing is a true copy

of Final Decree in the therein entitled cause as the same appears on file and of record in my office; that I have compared the same with the original and it is a true and correct transcript therefrom and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Detroit, in said district, this 13th day of October, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America, the one hundred and thirtieth.

WALTER S. HARSHA, Clerk.

By ADELAIDE ANDERSON VOORHEIS,
Deputy Clerk.



INJUNCTION.

UNITED STATES OF AMERICA:

THE CIRCUIT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF MICHIGAN, IN EQUITY.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To Hammell Cracker Company, and James F. Hammell, Samuel Dumphy and P. J. Hammell, and to their counselors, attorneys, solicitors, trustees, agents and servants, and each and every of them, Greeting:

WHEREAS, It has been represented to us, in the Circuit Court of the United States for the Eastern District of Michigan, in Equity, on the part of the National Biscuit Company, Complainant, that it has lately exhibited a Bill of Complaint and Decree against you the said Hammell Cracker Company, and James F. Hammell, Samuel Dumphy and P. J. Hammell, Defendants, to be relieved, touching the matters therein complained of; in which bill and decree it is stated, among other things, that you are combining and confederating with others to injure the said plaintiff touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience; we therefore, in consideration thereof, and of the particular matters in the said bill and decree set forth, do strictly command you, the said Hammell Cracker Company, and James F. Hammell, Samuel Dumphy and P. J. Hammell, and the persons before mentioned, and each and every of you, under the penalty of Ten Thousand Dollars, to be levied of your lands, goods, and chattels, to our use, that you do abso-

lutely desist and refrain from perpetually from affixing, using or applying or causing to be affixed, used or applied, in any way, upon cartons or the ends of cartons containing bakery products, any red seal with white line markings thereon, or from using or applying upon the ends of their cartons, containing bakery products, any seal in simulation, or imitation of, complainant's red end seal, or "In-er-seal" trade-mark, until the further order of this Court.

WITNESS, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this thirteenth day of October in the year of our Lord one thousand nine hundred and five and of the independence of the United States of America the one hundred and thirtieth.

WALTER S. HARSHA,
Clerk.

By ADELAIDE ANDERSON VORHEIS,
Deputy Clerk.



UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF MICHIGAN. } ss.

I, Walter S. Harsha, Clerk of the Circuit Court of the United States for the Eastern District of Michigan, do hereby certify that the above and foregoing is a true copy of Perpetual Injunction in the therein entitled cause as

the same appears on file and of record in my office; that I have compared the same with the original and it is a true and correct transcript therefrom and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Detroit, in said district, this 13th day of October, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and thirtieth.

WALTER S. HARSHA,
Clerk.

By ADELAIDE ANDERSON VOORHEIS,
Deputy Clerk.



Circuit Court of the United States

DISTRICT OF INDIANA

NATIONAL BISCUIT COMPANY
Complainant,

vs.

ISAAC F. WHITESIDE
Defendant.

} IN EQUITY
No. 10410

DEMURRER AND ORDER
OVERRULING DEMURRER

OFFIELD, TOWLE & LINTHICUM
Solicitors for Complainant.

W. H. H. MILLER
CHARLES K. OFFIELD
EARL D. BABST

Of Counsel for Complainant.

HARVEY, PICKENS, COX & KAHN
Solicitors for Defendant.

KEALING & HUGG
BAKEWELL & CORNWALL
Of Counsel for Defendant.



DEMURRER.

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF INDIANA.

National Biscuit Company, <i>Complainant,</i>	} In Equity. No. 10410.
<i>vs.</i>	
Isaac F. Whiteside, <i>Defendant.</i>	

The Demurrer of Isaac F. Whiteside, the defendant above named to the Bill of Complaint of National Biscuit Company, complainant.

This defendant, Isaac F. Whiteside, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto and for cause of demurrer sheweth:

1. That the said complainant has not in and by its said bill made or stated any such cause as doth or ought to entitle it to any such discovery or relief as thereby sought and prayed for from or against this defendant.

2. That it does not appear from the facts stated in said bill that the complainant is entitled to the exclusive use of what is designated in said bill as complainant's "In-er-seal" trade-mark.

3. That it does not appear from the allegations of said bill, or from the exhibits therein referred to, that defendant has infringed and is now infringing any exclusive right of complainant in and to the "In-er-seal" mark referred to in the bill of complaint.

4. That it does not appear from the facts stated in the bill of complaint herein that complainant is entitled

to the exclusive use of what is herein designated as complainant's "Uneeda" or "Uneeda Biscuit" trade-mark or trade-name.

5. That it does not appear from said bill of complaint, or from the exhibits referred to therein, that defendant has infringed any exclusive right of complainant in the name "Uneeda" or "Uneeda Biscuit."

6. That as to the things designated as "the nine remaining complainant's exhibits," referred to in paragraph sixteen of the bill, it does not appear from said bill—

(a) That the same are described in said bill with sufficient particularity for the defendant to answer in respect to the same;

(b) That it does not appear from said bill that complainant has any exclusive right with respect to any or all of said exhibits;

(c) That it does not appear from said bill, or from the exhibits referred to therein, that defendant has infringed, or is now infringing, any exclusive rights of complainant with respect to any or all of said exhibits.

7. That complainant has not in and by its bill of complaint shown that it is entitled to the sole and exclusive use of the form and arrangement and dress of the package referred to in paragraph "ninth" of the bill of complaint as "Complainant's Exhibit Carton Trade Name Uneeda Biscuit and Wrapper"; nor has complainant shown by its said bill that defendant has infringed, and is now infringing, any exclusive right of complainant in and to the same.

8. That it does not appear from the said bill of complaint that complainant is entitled to the exclusive use of the name "Jersey Butter" as applied to crackers or biscuits; nor does it appear from said bill that defendant has infringed, or that defendant is now infringing, any

exclusive right of complainant in the name "Jersey Butter" as applied to crackers or biscuit.

9. That it does not appear from said bill that complainant is entitled to the exclusive use of the figure of a cow stamped or marked on crackers; nor does it appear from the bill that defendant has infringed, or is now infringing, any exclusive right of complainant in respect to the figure of a cow stamped or marked on crackers or biscuit.

10. That it does not appear from the bill of complaint that complainant is entitled to the exclusive use of the word "Crisp" or "Crispy" as applied to crackers or biscuit; nor does it appear from said bill that defendant has infringed, or that defendant is now infringing, any exclusive right of complainant in and to the word "Crisp" or "Crispy" as a mark or name for crackers or biscuit.

11. That as to all of said bill which undertakes to claim infringement by defendant in respect to complainant's alleged cartons or packages referred to therein as "Complainant's Exhibits Cartons Baking Products, Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11," "Complainant's Exhibit Complainant's Carton Trade Name Uneeda Biscuit and Wrapper," and "Complainant's Exhibit Complainant's In-er-seal trade-mark," complainant is not in equity with clean hands and is not entitled to any equitable relief in this cause, as it appears from said exhibits, which are referred to in the bill and made part thereof by the allegations of the bill, as well as from matters of which this Court will take judicial notice, that as to each of said cartons it distinctly appears that the same (on the outer wrapper thereof) is now being represented by complainant as patented March 28, 1899 (which is the date of the Peters U. S. Patent No. 621,974 relating to cartons). Whereas, as appears from Volume 125 of the Federal Reporter, between pages 601

and 609 thereof (of which this Court will take judicial notice), on the 23rd day of November, 1903, the said Peters Patent for Carton was declared invalid by the United States Circuit Court of Appeals for the Eighth Circuit, on the ground that the same failed to disclose patentable novelty; and that it appears from the opinion, of the United States Circuit Court in said cause (120 Federal Reporter, between pages 679 and 687), which opinion of the United States Circuit Court was reversed by the United States Circuit Court of Appeals for the Eighth Circuit in the case reported in 125 Federal Reporter, *supra*, that the complainant in this cause, the National Biscuit Company, was, at the time said cause of *Peters vs. Union Biscuit Company* (reported in the Federal Reporter, volumes 120 and 125, *supra*) was pending and prior thereto, the exclusive licensee of Peters, the patentee of said patent No. 621,974, of March 28, 1899, so far as said patent might be used for packing bakery products. Therefore, it appears from the said bill of complaint, from complainant's exhibits above referred to, and from matters of which this Court will take judicial notice, that at the time of filing the bill in this cause and since the decision of the United States Circuit Court of Appeals for the Eighth Circuit, rendered November 23, 1903, in said cause of *Union Biscuit Company, appellant, vs. Peters, appellee* (see 125 Federal Reporter, 601-609), that complainant is still holding out to the public that said exhibit cartons or packages are protected by said Peters' United States letters patent, dated March 28, 1899, whereas, at the time of filing this bill of complaint and said exhibits, and since about one year before the filing of the same, the said Peters' Patent of March 28, 1899, has been adjudged of no force and effect by the United States Circuit Court of Appeals for the Eighth Circuit, which opinion and the decree entered in pursuance of the same is now, and was at the time of

filing the bill of complaint herein, in full force and effect, as complainant well knew at the time of filing the bill of complaint herein.

12. That it appears from said bill and the exhibits filed therewith, as well as from matters of which this Court will take judicial notice, that this defendant has not infringed the alleged trade-marks, trade-names or wrappers of complainant, there not being such similarity between the alleged trade-marks, trade-names or wrappers of complainant and those of defendant, as shown by the exhibits filed in connection with complainant's bill, as would deceive an ordinary purchaser using reasonable care so that he would buy the goods of defendant believing them to be the goods of complainant.

13. That complainant has not in and by its said bill stated such a case as doth or ought to entitle it to any equitable relief by way of injunction as against defendant, it not appearing from said bill that at the time of filing the same this defendant was continuing to do the acts of which complaint is made as acts done in the past by this defendant, nor does it appear from said bill that defendant is threatening to do, or about to do, the alleged acts complained of as having been done by the defendant.

14. As to the allegations of fraud in the bill of complaint, they are immaterial, since it appears from the whole bill, and the exhibits filed therewith, notwithstanding the epithets as to fraud used therein, that—

- (a) Complainant has no standing in a court of equity;
- (b) Complainant has no exclusive rights which have been violated by defendant;
- (c) Said allegations of fraud, taken in connection with the bill and exhibits filed therewith, do not connect de-

fendant with any specific acts which make him responsible to complainant in this action.

15. That the bill fails to show such facts in regard to the use by defendant of any package, carton, trade-mark or wrapper as constitute unfair competition in trade on the part of defendant in respect to any article sold by complainant, in that it does not appear from said bill that any article made and sold by defendant has been sold, or is likely to be sold, to any one as and for the goods of the complainant.

16. That as to paragraph "fourteen" of the bill, it does not constitute any cause of action, nor does it constitute any inducement to any cause of action, since it does not appear therefrom that if defendant did employ persons formerly in the employment of complainant, he thereby did an unlawful thing, or anything the doing of which can be taken cognizance of by this Court in this action; it does not appear from the allegations of paragraph "fourteen" of the bill that the said former employees of complainant were not free agents, free to take employment with others when and where they might see fit.

17. Referring to paragraph "twentieth" of the bill of complaint, defendant demurs thereto on the ground that it does not appear from the allegations of the bill in that paragraph or elsewhere that complainant is entitled to the exclusive use of the certain metallic rack or holder therein referred to and marked "Complainant's Exhibit Complainant's Retail Grocer Carton Exhibit Rack"; nor does it appear from the bill of complaint that defendant has infringed any exclusive rights of the complainant in and to said rack or holder.

18. That notwithstanding the allegations of the bill

of complaint herein as to defendant having originally been engaged wholly in the manufacture of bread and afterwards engaged in the manufacture of crackers and biscuit, it does not appear that defendant, by reason of such fact, is liable to the complainant in this suit; since it does not appear from the allegations of the bill of complaint, nor could it be recognized in law as a sound principle if it do appear from the bill of complaint that complainant is entitled to the exclusive monopoly in the manufacture and sale of crackers and biscuit.

19. That as to the allegations contained in "twenty-fifth" and "twenty-sixth" paragraphs of the bill, the same constitute no cause of action, neither do they constitute any inducement to any cause of action, against this defendant, and are mere surplusage, for the following reasons:

(a) The defendant is not shown to be a party, nor is defendant shown to be in privity with any party, to any suit stated or referred to in either of said clauses of the bill;

(b) It appears from said decisions or decrees in all of said cases (if the Court chooses to refer to the same) that the facts in each and all of said cases are utterly and entirely different from the facts in the case presented by the bill in this case;

(c) That the question as to defendant's liability in this action is to be determined by the facts in this case; and, on this demurrer, it clearly appears that complainant has stated no cause of action, no matter whether or not, in other cases against different defendants, under totally different states of facts, complainant has been able to state and establish causes of action.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant demurs thereto and humbly demands the judgment of this Court

whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

HARVEY, PICKENS, COX & KAHN,
Solicitors for Defendant.

KEALING & HUGG,
BAKEWELL & CORNWALL,
PAUL BAKEWELL,
Of Counsel for Defendant.

STATE OF MISSOURI, }
CITY OF ST. LOUIS. } ss.

Isaac F. Whiteside, being duly sworn, on his oath states that he is the defendant above named, and that the foregoing demurrer is not interposed for delay.

ISAAC F. WHITESIDE.

Sworn to and subscribed before me this 3rd day of February, 1905.

My Term expires 17th February, 1905.

GEORGE BAKEWELL,
Notary Public.

ORDER OVERRULING DEMURRER.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF INDIANA.

May Term, 1905.

June 17th, A. D. 1905.

Before the Honorable Albert B. Anderson, Judge.

National Biscuit Company	} No. 10,410 Chancery.
<i>vs.</i>	
Isaac F. Whiteside.	

Come now the parties by their respective solicitors, and thereupon the Court having heard the argument of Counsel and being sufficiently advised in the premises doth now overrule the demurrer to the bill of complaint herein.

And the defendant is ruled to answer by the first Monday of September next.

UNITED STATES OF AMERICA,	} ss.
DISTRICT OF INDIANA.	

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of an order entered in said court on the 17th

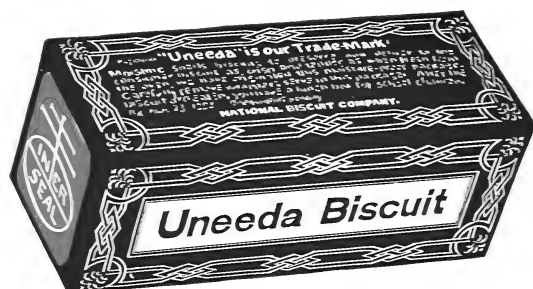
day of June, 1905, in the cause entitled National Biscuit Company vs. Isaac F. Whiteside, as fully as the same appears of record in my office.

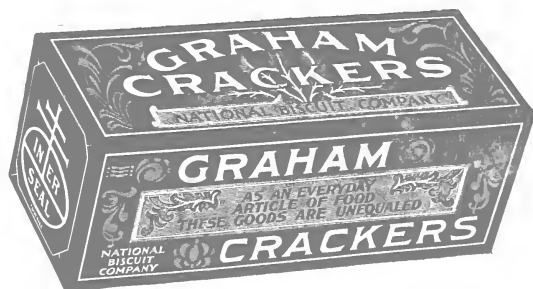
Witness my hand and the seal of said court, at Indianapolis in said District this 1st day of November, A. D. 1905.

NOBLE C. BUTLER,
Clerk.



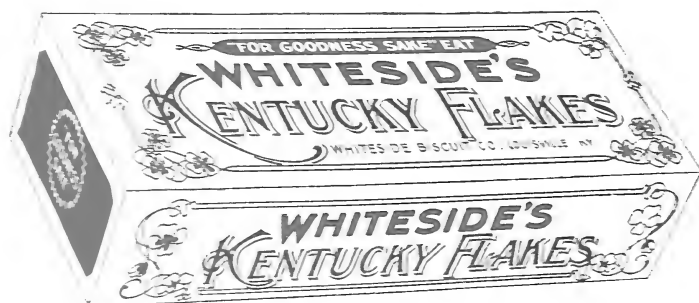


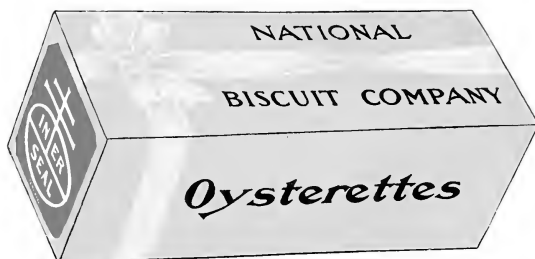




















STIPULATION.

UNITED STATES CIRCUIT COURT,

DISTRICT OF INDIANA.

National Biscuit Company,	}
<i>Complainant,</i>	
<i>vs.</i>	
Isaac F. Whiteside,	
<i>Defendant.</i>	}

ST. LOUIS, November 9, 1906.

A settlement of the above-entitled case is agreed to between the parties complainant and defendant, as follows:

The original package exhibits and samples of loose crackers referred to in the bill of complaint in this case and made part thereof having been produced for the purpose of inspection by both parties, it is agreed as follows:

That as to Mothers Biscuit package marked "Complainant's Exhibit, Defendant's Infringing Carton No. 1," it is agreed that Defendant shall abandon the use of the red color on the end seal, and instead of the red colored end seal shall use an end seal of yellow.

The color of the wrapper shall be changed from blue to green. A sample of the changed form of carton to be used by the Defendant is hereto attached and marked "Exhibit A."

As to Defendant's Graham Crackers complained of in this suit, which is marked "Complainant's Exhibit, Defendant's Infringing Carton No. 2," and which is provided with a red wrapper, it is agreed that the Defendant shall change the wrapper from red to brown, and substitute a yellow end seal for the red end seal. A sample of

the change agreed upon is hereto attached and marked "Exhibit B."

As to Defendant's package of Imperial Toast marked "Complainant's Exhibit, Defendant's Infringing Carton No. 3," Defendant is to abandon the wrapper and the name Imperial Toast.

As to Defendant's Oatmeal Cracker package marked "Complainant's Exhibit, Defendant's Infringing Carton No. 4," which is provided with a green wrapper with red panels and with red end seals, it is agreed that the defendant shall abandon the use of that wrapper as well as the red colored end seals; but nothing in this is to be construed as preventing the Defendant from using the word "oatmeal" in connection with his crackers, or from using the name or phrase "For Goodness Sake," or from using his own name in connection with oatmeal crackers.

As to "Complainant's Exhibit, Defendant's Infringing Carton No. 5" (Kentucky Flakes), it is understood and agreed that the Defendant shall substitute a yellow colored end seal for the red end seal on that exhibit, and change the body color of the wrapper, which in said exhibit is white, from white to a delicate blue color.

As to "Complainant's Exhibit, Defendant's Infringing Carton No. 6," which is Whiteside's Oyster Cracker, and is of a gray or slate color with red colored end seals, it is agreed that Defendant, from and after January 1, 1907, shall change the body color of the said wrapper from a gray to a light blue color, the red end seal for such packages having already been changed by the Defendant from a red color to a yellow color. Except as above stated, the printed matter on the said carton is to be the same as on the said exhibit, should the Defendant desire to use the lettering on that exhibit.

As to "Complainant's Exhibit, Defendant's Infringing Carton No. 7," being for Butter Thin crackers, it is

understood and agreed that the Defendant has abandoned that package.

As to "Complainant's Exhibit, Defendant's Infringing Carton No. 8," which is for Whiteside's Butter crackers, it is agreed that from and after this date the Defendant shall not use a red end seal and substitute therefor an end seal of yellow color.

As to "Complainant's Exhibit, Defendant's Infringing Carton No. 9" (Mamma's Ginger Wafers), it is agreed that the Defendant shall change his red end seal to an end seal of yellow color.

As to "Complainant's Exhibit, Defendant's Infringing Carton No. 10" (Whiteside's Milk Biscuit), it is agreed that the defendant shall change his red colored end seal to a yellow colored end seal.

As to "Complainant's Exhibit, Defendant's Infringing Carton No. 11" (Whiteside's Cracker Meal package), it is agreed that the defendant shall, on or before January 1, 1907, make the following changes in the carton or wrapper: Change the outer wrapper to a yellow color and substitute new directions and ornamental designs on the said wrapper. It is also understood and agreed that the defendant, as to the last named carton and wrapper, has changed the red end seal to a yellow colored end seal.

As to the separate cracker exhibits in this case, it is agreed that on or before January 1, 1907, the defendant shall take off from said cracker the name "Crispy" and change the form of said cracker from a six-cornered cracker to a three-cornered cracker, and abandon the word "Crispy" in connection with bakery products from and after January 1, 1907.

As to "Complainant's Exhibit, Defendant's Infringing Jersey Butter Cracker," it is agreed that on or before January 1, 1907, the defendant shall take off from that cracker the picture of a cow, and abandon the use

of the word "Jersey" in connection with the wrappers, boxes or display cans, or in any way in connection with the manufacture of crackers.

It is also understood and agreed that the exhibits which have been withdrawn by the Complainant and produced here in connection with this settlement, and which are referred to in the bill of complaint, shall be returned to the Court so as to form part of the record in this case.

It is also agreed that from this date on the defendant shall abandon the use of red colored end seals in connection with any bakery products manufactured or sold by the defendant, and that instead of red colored end seals he shall use a yellow colored end seal, or some color distinctly different from red.

It is also agreed that the taxable costs in this suit shall be paid by the defendant.

It is also agreed that in settlement of all claims for profits and damages on account of past infringements alleged in the bill of complaint herein, the defendant has paid to the complainant a sum of money satisfactory to the complainant, receipt of which is hereby acknowledged by the complainant.

It is also agreed that a consent decree for a perpetual injunction, consistent with this settlement, shall go against the defendant in respect to the packages hereinbefore specified, with the understanding that that injunction shall be suspended until January 1, 1907, in respect to certain of the packages specified herein and as fully explained herein; and that, the changes in the packages herein specified being made by the defendant, it shall not be contended by the complainant, at any time, that the packages, so changed as specified herein, are within the scope of any injunction that may be entered in this case in pursuance of this agreement.

Executed in triplicate at St. Louis, Missouri, this 9th day of November, 1906.

EARL D. BABST
OFFIELD, TOWLE & LINTHICUM
Solicitors and of Counsel for
National Biscuit Company.

PAUL BAKEWELL
Solicitor and of Counsel for
Isaac F. Whiteside.

W. H. H. MILLER
Of Counsel for Complainant.

L. M. HARVEY
Of Counsel for Defendant.

FINAL DECREE.

IN THE CIRCUIT COURT OF THE UNITED STATES.

For the District of Indiana.

November Term 1906.

December 10th, 1906.

Before Honorable ALBERT B. ANDERSON, Judge.

National Biscuit Company, Complainant,	} No. 10410.
<i>v.</i>	
Isaac F. Whiteside, Defendant.	

This cause coming on to be heard upon the pleadings and on the proofs taken on behalf of the Complainant, Messrs. Miller, Shirley & Miller and Messrs. C. K. Offield and Earl D. Babst appearing on behalf of Complainant and Messrs. Harvey, Pickens, Cox & Kahn and Mr. Paul Bakewell in behalf of the Defendant, and the Defendant not desiring to further contest this cause, a settlement having been made between the parties, it is therefore ordered, adjudged and decreed as follows:

1. That a settlement of damages and profits having been made by the parties and such damages and profits paid under such settlement, that no reference to the Master is therefore made.

2. That the taxable costs in this case, which it is agreed between counsel in this case amount to \$140.35, have been paid by the Defendant.

3. That an injunction issue according to the prayer of Paragraph 1 of Clause 3 of the bill of complaint in this case as against carton exhibits Nos. 1 to 11 inclusive and the two individual cracker exhibits, "Crispy" and "Jersey Butter;" but such injunction is not to take effect or be served until January 1, 1907.

4. That this decree is therefore final.

UNITED STATES OF AMERICA, } ss.
District of Indiana,

I, NOBLE C. BUTLER, Clerk of the Circuit Court of the United States within and for said district, do hereby certify that the above and foregoing are full and true copies of the stipulation filed and the final decree entered on the 10th day of December, 1906, in the case of the National Biscuit Company against Isaac F. Whiteside, as fully as the same appear upon the files and records now in my office.

WITNESS my hand and the seal of said Court, at Indianapolis in said district this 12th day of December, 1906.

NOBLE C. BUTLER,
Clerk.



INJUNCTION.

IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF INDIANA.

THE UNITED STATES OF AMERICA.

To Isaac F. Whiteside, his servants, agents and employees, and all claiming or holding through or under him, Greeting:

You, and each of you, are hereby strictly restrained and perpetually enjoined from in any manner whatsoever handling, advertising or selling packages or cartons containing bakery products having upon the ends thereof any red seal with white line markings thereon, or red seal substantially like the seal or Trade Mark of the National Biscuit Company, or from making, using, selling or handling cartons like the National Biscuit Company's carton containing the National Biscuit Company's Trade Name "Uneeda Biscuit" with wrapper accompaniment as shown in the National Biscuit Company's exhibit of the same in the cause in said court entitled the National Biscuit Company against Isaac F. Whiteside, No. 10,410, or the use of the word "Biscuit" upon a white parallelogram, as shown in Complainant's exhibit Defendant's Infringing Carton No. 1, in said cause, whether preceded by the word "Mothers" or any word associated therewith, or from the use of any wrapper application similar to or substantially like the wrapper application upon the National Biscuit Company's "Uneeda Biscuit" package; or from the use of any wrapper or red body color like or similar to the Graham Wrapper of red body color of the National Biscuit Company, shown in Complainant's Exhibit Carton Bakery Product No. 2, in said cause of the National Biscuit Company against Isaac F.

Whiteside, No. 10410, or from in any manner copying or simulating the other carton exhibits of the National Biscuit Company with its wrapper accompaniment and red seal thereon, as shown and identified by the various exhibits filed in said above entitled cause; or from selling crackers in bulk like Complainant's Exhibit Complainant's Jersey Butter Cracker, and Complainant's Exhibit Complainant's Crispy Cracker, filed in said above entitled cause; and from violating and infringing the rights of the said National Biscuit Company as hereinabove set forth.

Whereof you are not to fail at your peril.

WITNESS the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States and the seal of said Circuit Court at Indianapolis in said District, this 1st day of January, A. D. 1907.

NOBLE C. BUTLER,
Clerk.



MARSHAL'S RETURN.

UNITED STATES OF AMERICA, }
District of Indiana. } ss.

Received this writ at Indianapolis, Jany. 5th, 1907, and served on the within named Isaac F. Whiteside, by reading to and in his hearing at Jeffersonville, Clark County, Indiana, Jany. 7th, 1907, and by handing him copy of same on Jany. 8th, 1907.

HENRY C. PETTIT, U. S. Marshal,
 By ALONZO BOYD, Deputy.

UNITED STATES OF AMERICA, }
District of Indiana. } ss.

I, NOBLE C. BUTLER, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of the writ of injunction and return of the marshal thereon, filed in said court on the 11th day of January, 1907, in the cause of National Biscuit Company *vs.* Isaac F. Whiteside, No. 10410, as fully as the same remains on file in my office.

WITNESS my hand and the seal of said Court, at Indianapolis in said District, this 11th day of January, A. D. 1907.

NOBLE C. BUTLER,
 Clerk.



In Chancery of New Jersey

Between

NATIONAL BISCUIT COMPANY

Complainant,

and

PACIFIC COAST BISCUIT COMPANY,
CHARLES M. WARNER, JOHN C. HAN-
RAHAN, WILLIAM M. LAWS, HER-
MAN WITTENBERG, MORITZ THOM-
SEN, CHARLES HOTCHKISS, and A.
M. BROOKES, Officers and Directors of
said PACIFIC COAST BISCUIT COM-
PANY

Defendants.

On Bill
for Relief

CONCLUSIONS

VREDENBURGH, WALL & CAREY
Solicitors for Complainant

CHARLES K. OFFIELD
EARL D. BABST
Of Counsel

COLLINS & CORBIN
Solicitors for Defendants

WILLIAM D. FENTON
Of Counsel



Between
National Biscuit Company
Complainant,

and

Pacific Coast Biscuit Company,
and Charles M. Warner, John
C. Hanrahan, William M.
Laws, Herman Wittenberg,
Moritz Thomsen, Charles
Hotchkiss and A. M. Brookes,
Officers and Directors of said
Pacific Coast Biscuit Company
Defendants.

On Bill, &c.
CONCLUSIONS.

On final hearing on pleadings and proofs.

Messrs. Vredenburg, Wall & Carey, Mr. Charles K. Offield (of the Illinois Bar) and *Mr. Earl D. Babst* (of the New York Bar), for complainants.

Messrs. Collins & Corbin and *Mr. William D. Fenton* (of the Oregon Bar), for defendants.
Walker, C.

The object of this bill is to restrain unfair competition in trade.

The complainant and defendant companies are corporations organized under the laws of this state. Both are engaged in the same line of trade, the manufacture and sale of bakery products. The business of the defendant company is confined to the Pacific Coast States and adjacent territory, while the field of activity of the complainant company is nation-wide. The complainant's career commenced in 1898, when it acquired some of the leading bakery-plants in the country, with which it be-

gan operations. It already had a market for its goods, brought to it by these plants, and by the exercise of a superior order of scientific and mechanical intelligence and of commercial acumen and industry, acquired a wide and enviable reputation for the high quality of its products. A market for these wares was established in the defendant's territory shortly after the complainant started business in 1898.

The principal innovation made in the bakery line by the complainant is that of housing and transmitting to the ultimate consumer bakery products with a minimum of deterioration, and practically as they leave the ovens. This is accomplished by the use of paper-cartons. Up to the complainant's advent, shipments were mainly in "bulk," that is, in barrels and wooden boxes. Paper-cartons, of the shoe-box style, with loose paper-lining, and hermetically sealed tin-boxes, were also used, but only to a very limited extent. The tin boxes were commercially too costly and the shipment in bulk was objectionable because of the tendency of the contents to absorb moisture and deleterious and offensive odors, and to breakage. Uncleanliness in the handling by the retailer was also to be reckoned with.

The paper-cartons adopted by the complainant were much smaller than those theretofore used and were of a size to permit of sales at popular prices—five and ten cents per package. These cartons are constructed by superimposing upon the carton blank, made of cardboard, a sheet of wax-paper of the size and shape of the blank, which when folded, form a unit-box, and, it is said, possess the quality and capacity of preserving the contents equal to the hermetically sealed tin-box. The cartons are of various sizes and shapes, adapted to the forms of the proposed contents; and to identify the contents as its products, and to distinguish the same from those of other dealers, the complainant adopted a trade-

mark and a variety of trade-names for its various products, and peculiar and distinctive labels and wrappers to envelop the cartons, all of which, it is claimed, the defendant fraudulently simulated, to the injury and damage of the complainant's trade.

The alleged infringement of fifteen widely different styles of cartons and carton-wrappers and applied trade-names, for as many kinds of crackers or biscuits; the methods of construction of the carton and of the form of bundle-package of assembled cartons, as well as the trade-mark, is involved in this litigation.

The law relating to fraudulent or unfair competition between traders is so firmly established and has been so lucidly illustrated and defined by the courts of England and of this country, that extended citation of authorities will be profitless. The underlying principle that no man has a right to palm off his wares as those of another, thereby cheating the purchasing public and filching the business of a rival, is so essentially an element of natural justice and so solidly imbedded in our jurisprudence, that all that is necessary to quicken a court of equity is to show that in the particular instance the offense has been committed. The cases cited by counsel in their briefs exemplify the illimitable conditions and circumstances under which this simple doctrine, requiring men to be honest towards each other, may be invoked.

The case of *Wirtz v. Eagle Bottling Company*, 50 N. J. Eq., 164, is a striking example of the adaptation of the principle to unfair competition in the use of imitative labels and wrappers. The opinion in that case so fully covers the whole scope of the law applicable to the facts presently to be considered, and furnishes so clear a guide, that I am persuaded to quote from it *in extenso*. The complainant, in that case, by his industry and fair dealing, had built up a large and valuable trade as a

bottler of beer and identified his goods by a peculiar and distinctive label, which label the defendant substantially copied. Vice-Chancellor Van Fleet, in granting a preliminary injunction, subsequently made perpetual, at p. 166, said:

“If we speak with accuracy, these labels cannot be called trade-marks, but they serve substantially the same purpose. They are the marks by which the complainant’s goods are distinguished in the market from all like goods put upon the market by other persons, and are, for that reason, according to many decisions, just as much under the protection of the law as trade-marks are. The law protects them for the same reasons and in precisely the same way that it does trade-marks. The leading principle of the law on this subject is, that no man should be permitted to sell his goods on the reputation which another dealer has established in the market for his goods, and this principle applies with equal force to the case where the goods of such other dealer are known in the market by a label as it does to the case where they are known by a mark which is strictly a trade-mark. No dealer can lawfully adopt the label of another dealer, or one so near like it as to lead the public to suppose that the article to which it is affixed was put upon the market by such other dealer. *Miller Tobacco Manufactory v. Commerce*, 16 Vr. 18, 24. The reasons upon which this rule rests were stated by Mr. Justice Knapp, in the case just cited, substantially as follows: While the markets are open and free to all, and fair competition should be encouraged, still every dealer must be required, for the protection of the public and to promote fair dealing, to depend for his success upon his own reputation and the quality of his own productions. If he were allowed to deal under false colors and sell his productions for those of others, the result would be that he would not only cheat the public, but also defraud him whose right place in the market he filled with spurious goods. Such competition would not be fair competition—it would be closer akin to piracy.

* * * * *

The defendant's labels were prepared under the direction of its general manager * * * He further says, that in designing the defendant's labels he had no purpose or design of palming off the defendant's goods for those of the complainant. Admitting all this to be true, it is manifest it constitutes no defense. The vital question in cases of this kind is not what did the defendant mean, but what has he done? The legal quality of an act, resulting in injury, must be decided not by the motive with which it was done, but by the consequences which have necessarily resulted from it. The law, in civil cases, does not attempt to penetrate the secret motive which induced the act brought in judgment, but judges of its legal quality solely by the consequences which have actually and necessarily proceeded from it. It is no less a dictate of justice, than of sound reason, that every person must be understood to have intended to do just what is the natural consequence of his act deliberately done.

* * * for it is a matter of common knowledge that the ordinary buyer does not, as a general rule, exercise as much caution in buying an article for which he pays a few pennies as he does in purchasing a more valuable thing. The instances are very rare, I suppose, where a purchaser exercises as much care in buying a bottle of beer as he does in buying a bottle of whiskey, a box of cigars, or a hat or a coat.

* * * Where, as in this case, the subject-matter of the controversy is labels, and the question is, whether one is a fraudulent simulation of the other, the decision must always, to a large extent, be controlled by the evidence furnished by the labels themselves. As a general rule, they constitute the very best evidence of which the case is susceptible. That is the case here. A comparison of these labels, whether made singly or in a group, shows conclusively, as I think, that the use of the defendant's labels constituted a plain violation of the complainant's right. It is difficult to believe that one set of labels could have been made so near an exact copy, in all their special characteristics, of another set without an effort at simulation."

In 1900 the complainant, the National Biscuit Company, adopted as its trade-mark a sign or symbol known

in the trade as the "In-er-seal" or "In-er-seal trade-mark." This seal is square, and of a peculiar shade of red, with clipped corners and white lines thereon forming an ellipse, divided equally by a horizontal line, from which extends a perpendicular line halving the upper half of the ellipse, with two horizontal lines crossing the perpendicular line above the ellipse. This configuration of white lines on the seal is said to have been the sign and mark of the first printers in the early period of that art, taken by them from the Catholic church, and by the latter from Paganism, and signifies the triumph of the spiritual over the material world. These seals were placed upon each end of all the paper-cartons containing the bakery products placed on the market by the complainant, and in addition to the purpose they serve in sealing the cartons, are an attractive and conspicuous feature of the carton wrapper.

The initial trade name coined and applied by the complainant to an important part of its cracker output is "Uneeda" or "Uneeda Biscuit." The association of the "In-er-seal" trade-mark and the name "Uneeda Biscuit" formed the slogan of the complainant's business. By the expenditure of a stupendous amount of money in lavish, but judicious, advertisement, they became known to almost every man, woman and child in this country, as the identifying mark and name of the complainant's goods. I quite agree with the statement of one of the witnesses who testified, that "Uneeda Biscuit and the In-er-seal, it may be said, are woven into the fabric of the National Biscuit Company. In fact, they are the business. As to their value they are probably worth millions of dollars to the National Biscuit Company. Its physical properties such as plants, machinery, and so forth, if destroyed, could be replaced within a reasonably short time, while the loss of the In-er-seal and Uneeda

Biscuit and the good-will that goes with them, would be, if not irretrievable, at least a very great calamity."

The defendant, The Pacific Coast Biscuit Company, succeeded to the business of the Portland Cracker Company in 1899. The latter named company had been engaged in the cracker baking business at Portland, Oregon, since 1886, and in the carrying on of its business used a variety of labels, some descriptive of the package contents and others to identify its various kinds of cracker and biscuit output, and to mark them as the product of that company, but none that bore any resemblance to the "In-er-seal," the label of the complainant; none square in shape, with clipped corners, a red field with white marking and applied to either end of paper-cartons of the dimensions of those of the complainant. When the defendant bought the property of the Portland Cracker Company it took over these seals and for a time used them, substituting only its name for that of its predecessor, until about the year 1903, when they were practically discarded, and a seal known as "Gold Coast End Seal" was adopted, which was also far unlike the complainant's "In-er-seal." In 1907 this one was also abandoned, and a red-end seal termed "Swastika Red-end Seal," with clipped corners and white line markings upon a back-ground of red exactly the same shade as the complainant's seal and which is the infringing seal complained of, was substituted. It is described in the record as a symbol of prehistoric origin, emblematic of a beneficent Deity, eternal life, benediction and blessing, good wishes and good augury, and was and is used by Indian basket makers and blanket weavers, potters, and silver-smiths, and is known as the Navajo Indian cross, and was well known and in use as a religious emblem in India fifteen centuries before the Christian era. Like the complainant's "In-er-seal" it is being used by the defendant on both ends of paper-cartons of identically the same size

and shape as the complainant's cartons. The two labels, the "In-er-seal" and the "Swastika" differ only in their markings. Laid side by side, and disassociated from the cartons, the resemblance is not marked, but when the defendant's seals are applied to the end of cartons resembling, as to size, shape, wrapper application, and euphony of coined names, the similitude is striking, and when thus associated is of a character calculated to mislead and deceive the unwary and unsuspecting purchaser.

The federal courts have had occasion, by injunction, to protect this complainant in its seal and seal application against an infringing seal, under circumstances much like those present in this case. *Ohio Baking Company v. National Biscuit Company*, 127 Fed. Rep. 116; *National Biscuit Company v. Swick*, 121 Fed. Rep. 1007.

The claim of the defendant that it and its predecessor, the Portland Cracker Company, used a red-end seal, square in outline with clipped corners, upon the end of cartons, to denote its wares, prior to the adoption by the complainant of its In-er-seal, is not sustained by the testimony. Moreover, the red-end seals which were used by the defendant were, as I have already stated, discarded for the "Gold Coast seal" in 1903.

Inspection and comparison of the cartons of the complainant and defendant, of the nomenclature and wrapper embellishment, and of the red-end seal application, are sufficient to satisfy me of the copying by the defendant of the complainant's trade-name and carton and carton-wrappers. I cannot conveniently deal with the cartons collectively, nor will it be possible, within the limits of these conclusions, to advert in detail to all of the points of similarity between the two sets of cartons, to which my attention has been called, and, therefore, reference will only be made to the prominent features.

Generally, as to size, shape and capacity (and the fifteen cartons of the complainant differ in these respects),

it may be said, that the defendant's cartons are exact and substantial counterparts of the complainant's. The red-end seal on both ends of the infringing cartons, and the superimposed wax-paper interior, are also uniform points of likeness. The resemblances in other respects, submitted by the complainant, I will take up in the order in which the infringements are charged in the bill.

1. This relates to the red-end seal already disposed of.

2. Complainant's "UNEEDA;" Defendant's "ABETTA" BISCUIT. The wrappers of the two cartons to which these words are applied are of a dark body color, with white parallelogram decorations. The style of type and the location of the display of the name of the biscuit and of the reading matter, is the same, and the latter conveys the same meaning. That the complainant is entitled to the exclusive use of this coined word, as applied to crackers or biscuits, seems to me to be beyond question, and this extends to any word similarly applied, which rings with the same tone. "Abetta" was coined by the defendant with knowledge of the use and application by the complainant of the suggestive name "Uneeda." This, coupled with the circumstances of two consecutive abandonments by the defendant of similar and graduating, but less offensive infringing cartons, and the obvious purpose of creating the impression of an alliance between the two biscuits, and of superiority in that of "Abetta" (a better than Uneeda), evinces that the selection by the defendant of the word "Abetta" was intended to bring to it profit from a confused purchasing public.

3. Complainant's "NABISCO"; Defendant's "PARFAIT" and "FIESTA." The word "Nabiseo" is made up practically of the initial syllable of each of the words of "National Biscuit Company." Both packages

are of tin. The contents of each is a sweet cracker. The color scheme of the wrappers is the same. It is of a white background with red and gold decorations, clearly a case of copying.

4. Complainant's "SOCIAL TEA BISCUIT;" Defendant's "ELITE BISCUIT." There is a pronounced resemblance in the decorations and appearance of these two packages. "Social" and "Elite" convey the same impression, and the substitution of the latter for the former on the defendant's cartons evinces but a single motive: confusion.

5. Complainant's "UNEEDA MILK BISCUIT;" Defendant's "ABETTA MILK BISCUIT." These are as nearly alike as "two peas in a pod." The answer of the defendant respecting its carton and its statement that it has stopped making it, impliedly confesses copying.

6. Complainant's "OYSTERETTES;" Defendant's "TOKE POINT OYSTERETTES." This word "oysterettes" was coined by the complainant and applied to a particular brand of its crackers, in the year 1901. The word is indicative of the contents of the cartons. Up to 1909 the complainant had marketed some fifty millions of these carton contents, under this trade-name, and, on the Pacific coast, in excess of a million. The claim of the defendant that its predecessor originated and applied this name to a brand of its goods prior to the adoption by the complainant, is not borne out by the testimony. The prominent eye-object on the carton is, of course, the word "Oysterettes." The defendant's "Toke Point" is printed with type comparatively obscure; the boxes are of the same size.

7. Complainant's "FIG NEWTONS;" Defendant's "FIG SULTANA." The copying here is manifest. The body-color of the wrapper in each carton is white, with

gold scroll work embellishments and red-end seal. Obviously the defendant's carton is an imitation.

8. Complainant's and Defendant's "MARSHMALLOW DAINTRIES." The complainant was the first to originate and apply this trade-name to one of its carton bakery products. This was in 1905. Up to the time of the taking of the testimony in 1909, it had sold under this name some five million of these carton contents. The exact trade-name has been appropriated by the defendant, and is the subject of complaint.

9. Complainant's "ZU ZU;" Defendant's "HOO HOO" GINGER-SNAPS. "Zu Zu" and "Hoo Hoo" are merely catch words, with the same general sound when spoken, and not widely different to the non-discriminating when printed. The words respectively on the two cartons have the same general appearance, and with the box arrangement and red-end seals, show similarity, and leave the impression that imitation was intended. "Zu Zu," as a trade name was adopted by the complainant in 1901, and applied to ginger-snaps. The sale of these cartons to June, 1909, was approximately one hundred million, and over a million in the Pacific coast states. The defendant claims the right to the use of "Hoo Hoo" because of prior appropriation by its predecessor. The record does not satisfy me that this contention is well founded.

10. Complainant's "FROTANA;" Defendant's "MARITANI" FRUIT BISCUIT. Similarity of size of cartons, of wrapper coloring, of red entering largely into the decorations, the red-end seal application, the fruit biscuit contents, and the confusion between the two names as to pronunciation of their ending syllables, taken as a whole, evidence copying.

11. Complainant's and Defendant's "COCOANUT DAINTRIES." This term was originated by the complainant as a mark for one of its products. The trade-name

has been copied. Both cartons are of the same size. The general arrangement of the lettering, the light color of the two boxes and the red-end seal, all tend towards confusion.

12. Complainant's "OLD TIME SUGAR COOKIES;" Defendant's "OLD FASHIONED SUGAR COOKIES." The only change made by the defendant in appropriating this trade-name is the substitution of the word "Fashioned" for the word "Time", both of which, in connection with the remainder of the name, have the same significance. The same size and shape of the carton, of the white colored wrappers, and the application of the red-end seal, complete the likeness.

13. Complainant's "CELEBRATED ZWIEBACK;" Defendant's "GENUINE ZWIEBACK." These packages are approximately of the same size and shape. The German and English printed matter bears comparatively the same appearance and meaning. Aside from this and the red-end seal application, there does not appear to be other similarity.

14. Complainant's "FANCY ASSORTMENT;" Defendant's "FANCY ASSORTED CAKES." The size and dress of these cartons have a single eye appearance. The term applied to the defendant's carried with it the same meaning as that adopted by the complainant. The decorations, as to red border-lines, are attracting similarities.

15. Complainant's "OATMEAL CRACKERS;" Defendant's "ABETTA OATMEAL CRACKERS." Both wrappers are green. The shade of the defendant's varies slightly from that of the complainant's. The prominent sight object on both is "Oatmeal Crackers." On the defendant's in dim type and small print, apparently intended not to be readily observed, is the word "Abetta."

16. Complainant's and Defendant's "ANIMAL BOX."

These seem to be counterparts, even to the cord handle. Here the copying is complete.

The history, as disclosed by the voluminous record, of the progressive steps of the defendant in the work of seal imitation, which culminated in the adoption of the "Swastika" seal, read in connection with the history relating to the constant advance in copying, and the gradual approach by the defendant in the use of cartons and wrappers, in appearance like those of the complainant, convinces me that the "Swastika" red-end seal was fashioned and applied by the defendant to the ends of its cartons, and that these cartons and wrappers and trade-names, so much like those of the complainant, were simulated by the defendant for no other purpose than to mislead the public into purchasing its goods for those of the complainant's, and thus to purloin the complainant's business. I cannot escape this conclusion.

The Portland Cracker Company and the defendant built up a cracker trade, with seals of a distinctive type, the more prominent and generally used one of which was a red seal with a boy sitting on a cracker-box, apparently exhibiting a cracker in each hand, dividing the words, "Our Brand." The defendant also created its own style of cartons and wrappers to individualize and distinguish its output. After the complainant entered the industry and introduced its novel and successful methods a campaign of simulation upon the part of the defendant began. Seals were abandoned and cartons and carton-wrappers of the defendant's selection and origin were from time to time discarded and eventually replaced by those the subject of this suit. The deadly parallel between the entire line of the complainant's and defendant's seals, cartons, carton-wrappers and trade-names is so conspicuous that it requires no great perspicuity to observe that the defendant's present methods of displaying and vending its wares are not attributable to any desire on its part to

honestly build up a trade of its own, but rather that they are the culmination of a premeditated and single purpose of dealing under the cover of the good-will of a successful rival.

It is unnecessary in these passing-off cases to find intentional fraud or that it be shown that anyone has been actually deceived to entitle a complainant to protection. It need not appear that there is precise copying of any one of the cartons of the complainant. In *Ball v. Siegel*, 116 Ill., 137, it was said:

“It is true, that in cases of this kind, as a general rule, exact similitude is not required to constitute an infringement, or to entitle the complaining party to protection; but if the form, marks, contents, words, or other special arrangement or general appearance of the words of the alleged infringer’s device are such as would be likely to mislead persons in the ordinary course of purchasing the goods, and induce them to suppose that they were purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection, if he takes seasonable measures to assert his rights and prevent their continued invasion.”

And Vice Chancellor Van Fleet, in the *Wirtz* case (50 *N. J. Eq. at p. 168*) puts it thus:

“If it appears that the resemblance between the two labels is such that it is probable in the sale of the goods of the parties, the one will be mistaken for the other, enough is shown to make it the duty of the court to interfere. *Edelsten v. Edelsten*, 1 *De. G., J. & S.* 185, 200. As was said by Mr. Justice Clifford, in *McLean v. Fleming*, 96 *U. S.* 245—a case in which all the principles pertinent to the case in hand were stated with great clearness and fullness—no rule, as to what degree of similarity must exist in order to constitute an infringement, can be laid down which may be applied to all cases. All that can be done in that record is to say, that where the similarity is sufficient to convey a false impression to the public mind, and is of a character to deceive the ordinary

purchaser, buying with the caution usually exercised in such transactions, there sufficient ground exists to entitle the injured person to redress. There are cases which lay down a more liberal rule in favor of persons claiming protection, and declare that if the resemblance is only such as is calculated to deceive the careless and unwary, a sufficient degree of similarity will exist to justify the court in interdicting the use of the counterfeit."

The facts in the case *sub judice*, in my judgment, abundantly establish that the defendant's cartons and carton-wrappers, its seal trade-mark and trade-name, associated as they are, tend towards deceiving and are likely to deceive the purchasing public into the belief that the defendant's crackers and biscuits are those of the complainant.

The carton formation and the bundle packages are not the subject of exclusive appropriation by the complainant, as devices to mark and indicate its products. The cartons known as the "Peter's Patent" were declared in *Union Biscuit Company, et al. v. Peters*, 125 *Fed. Rep.* 601, as not a patentable invention. There can, of course, be no monopoly of the shape, size or capacity of a box. The lining of such boxes, with wax or paraffine paper superimposed thereon, and forming a unitary structure capable of inter-folding at the ends, for the enclosing of perishable goods, is a system or method which, it seems to me, must necessarily be common to all bakers. I have not a doubt but that the complainant used this form of package before the defendant, and that the secondary purpose of the defendant in adopting it, was a part of its general plan of imitating the complainant's line of operation. Nor do I think it can be disputed that, in connection with the other simulations which have already been pointed out, this particular one failed of its mission. This may also be said of the bundle package. Instead of using wooden boxes to enclose for

shipment an assembled assortment of filled cartons, the complainant used paper shaped into box form. The only service in this case of the imitation of the carton package and the bundle package, is to emphasize the trend of the defendant towards copying the complainant's style.

There will be an injunction restraining the defendant, including the director-defendants (for the sake of convenience I have heretofore referred to all of the defendants as one), from putting up and selling or offering for sale:

(a) Any carton of bakery products having thereon an imitation of complainant's "In-er-seal" trade-mark, calculated to mislead or deceive, like the defendant's "Swastika" trade-mark. This shall not be construed to restrain the defendants from selling such cartons with their asserted trade-mark thereon, provided the trade-mark is so differentiated in general appearance and application, from the complainant's trade-mark, that it is not calculated to deceive the ultimate ordinary purchaser.

(b) Any carton of bakery products having thereon an imitation of complainant's "Uneeda Biscuit" trade-name, calculated to mislead or deceive, like those on defendant's carton "Abetta Biscuit."

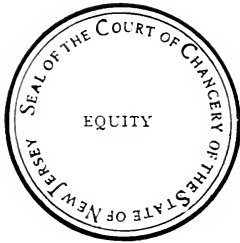
(c) Any carton of bakery products having thereon an imitation of complainant's trade-names "Uneeda Milk Biscuit," "Oysterettes," "Marshmallow Dainties," "Cocoanut Dainties," and "Oatmeal Crackers," calculated to mislead or deceive, like those on defendant's cartons respectively "Abetta Milk Biscuit," "Toke Point Oysterettes," "Marshmallow Dainties," "Cocoanut Dainties," and "Abetta Oatmeal Crackers."

(d) The particular forms of cartons or packages referred to in the bill of complaint and identified therein as "Complainant's Exhibit Defendant's Abetta Biscuit

and Red-end Seal Carton No. 2," and "Complainant's Exhibit Defendant's Infringing Packages Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16, respectively," which shall by reason of the collocation of size, shape, colors, lettering, spacing and ornamentation, present a general appearance as closely resembling complainant's exhibits respectively referred to in the bill of complaint and marked as "Complainant's Exhibit Complainant's Cartons Trade-name Uneeda Biscuit Wrapper No. 2," and "Complainant's Exhibit Complainant's Cartons Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16," as do the said defendant's respective infringing packages afore-mentioned, but this shall not be construed as restraining the defendants from selling packages or cartons of the size, weight and shape of complainant's packages, nor from using the respective colors as wrappers for such packages, provided such packages are so differentiated in general appearance from the said complainant's respective packages that they are not calculated to deceive the ultimate ordinary purchaser.

The complainant's prayer for an accounting will be denied, upon the grounds and for the reason stated by Vice Chancellor Stevenson in *The International Silver Co. v. William H. Rogers Corporation, et al.*, 66 N. J. Eq. 140.

The complainant is entitled to costs.



I, ROBERT H. McADAMS, Clerk of the Court of Chancery of the State of New Jersey, the same being a Court of RECORD, DO HEREBY CERTIFY that the foregoing is a true copy of the CONCLUSIONS, filed June 6th, 1914, in a cause wherein The National Biscuit Company is complainant and The Pacific Coast Biscuit Company, *et al.*, are defendants, now on the files of my office.

IN TESTIMONY WHEREOF I have hereto set my hand and affixed the seal of said court, at Trenton, this Sixth day of June, A. D., Nineteen hundred and fourteen.

ROBERT H. McADAMS,
Clerk.

IN CHANCERY OF NEW JERSEY.

Between

NATIONAL BISCUIT COMPANY,
Complainant,

and

PACIFIC COAST BISCUIT COMPANY,
CHARLES M. WARNER, JOHN C.
HANRAHAN, WILLIAM M. LAWS,
HERMAN WITTENBERG, MORITZ
THOMSEN, CHARLES HOTCHKISS
and A. M. BROOKES, Officers
and Directors of said PACIFIC
COAST BISCUIT COMPANY,
Defendants.

} FINAL DECREE.

This cause being opened to the Court by Vredenburgh, Wall & Carey, Solicitors for the Complainant, and in the presence of Charles K. Offield and Earl D. Babst of Counsel with the Complainant, and in the presence of Collins and Corbin, Solicitors for Defendants, and William D. Fenton and Carl M. Herbert, of Counsel for the Defendants; and the cause having been fully heard upon arguments, pleadings and proofs and printed briefs having been submitted; and the Court having fully considered the same—

It is, on this 29th day of September, 1914, by His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, and the Chancellor doth by virtue of the power and authority of the Court of Chancery of New Jersey, ORDER, ADJUDGE and DECREE as follows—

FIRST.—That the red end seal, known as the “In-er-seal”, appearing upon the various carton bakery products of the Complainant, with white line markings thereon, is a good and valid Trade Mark and the property of the Complainant, and that the red end seal appearing upon the ends of the carton products of Defendants is an infringement upon the Complainant’s red end seal;

SECOND.—That the Complainant’s Trade Name or Trade Mark “Uneeda” is a good and valid Trade Mark and Name, and the property of the Complainant, and that Defendants’ name or mark “Abetta” Biscuit, with its placement upon Defendants’ carton, is an infringement of said Complainant’s name or mark herein;

THIRD.—That Complainant’s Trade Mark or Trade Name “Nabisco” is the mark or name of the Complainant, and that Defendants’ carton or package, with the words “Parfait” and “Fiesta” in the same manner of display, are infringements of Complainant’s Trade Mark or Name “Nabisco” as applied, by the simulation therewith of the color scheme of the wrappers thereof;

FOURTH.—That the name, mark or words “Social Tea” Biscuit as applied by the Complainants upon cartons of crackers, is the property of said Complainant, together with the decoration and appearance of said package, and that the Defendants’ carton or package “Elite” Biscuit is a simulation and copying of said name or word designation in the same manner of display, of Complainant’s on said package;

FIFTH.—That Complainant’s Trade Name, Mark or term “Uneeda Milk Biscuit”, and the decoration and marking on Complainant’s carton of biscuit products is the Trade Mark and Trade Name property of Com-

plainant and Defendants have markedly infringed the same by copying such carton in connection with the name "Abetta Milk Biscuit" in the same manner of display as Complainant's carton;

SIXTH.—That the word, term or name "Oysterettes" is the Trade Mark or Trade Name property of the Complainant, and the Defendants have infringed and copied the same in the same manner of display as Complainant's carton;

SEVENTH.—That the Complainant is the owner of the Trade Mark or Trade Name "Fig Newtons" as applied to bakery products and cartons containing bakery products, and that the Defendants have manifestly copied the same by the use of the word "Fig Sultana" and the copying of the carton embellishment or decoration, in the same manner of display, in connection with the Complainant's Trade Name or Mark "Fig Newtons" upon their carton.

EIGHTH.—That the Complainant is the owner of the Trade Mark or Trade Name "Marshmallow Dainties" as applied to its carton bakery products, and that the Defendants have infringed and copied the same by the use thereof, upon their cartons of bakery products, in the same manner of display;

NINTH.—That the Complainant is the owner of the Trade Name "Zu Zu" as applied to bakery products and cartons of bakery products and that the Defendants have simulated and copied the same, by the use of the words "Hoo Hoo" upon their Ginger Snap carton, in the same manner of display and having the same general appearance;

TENTH.—That Complainant is the owner of the Trade Name or Trade Mark “Frotana” as applied to bakery products and cartons containing bakery products, and that Defendants have copied and infringed the same by the use of the word “Maritana” upon cartons of bakery products of similar size, color and decoration in the same manner of display as Complainant’s cartons;

ELEVENTH.—That Complainant is the owner of the Trade Mark or Trade Name “Cocoanut Dainties” as applied to bakery products and cartons containing bakery products and that the Defendants have violated and infringed the same, by the use and application of the said Trade Mark or Trade Name “Cocoanut Dainties” to cartons of bakery products, in the same size, general appearance of lettering and coloring, and in the same manner of display as Complainant’s cartons;

TWELFTH.—That the Complainant is the owner of the Trade Mark or Trade Name “Old Time Sugar Cookies” as applied to bakery products and the cartons containing bakery products, and that the Defendants have violated, infringed and copied the same by the use of the word or name “Old Fashioned Sugar Cookies” upon cartons of the same size and shape and white coloring, and in the same manner of display of the Complainant;

THIRTEENTH.—That the Complainant is the owner of the words, name or term “Celebrated Zwieback” as applied by them to cartons of bakery products, and that the Defendants have copied and infringed the same by the use of the words “Genuine Zwieback” on packages of substantially the same size and in the same printing and manner of display as appears upon Complainant’s cartons;

FOURTEENTH.—That the Complainant is the owner of the Trade Mark or Name or designation “Fancy Assortment” as applied to cartons containing bakery products; that Defendants have copied and infringed the same by the use of the word or name “Fancy Assorted Cakes” upon cartons of the same size and prominent dress appearance and in the same manner of display as Complainant’s cartons;

FIFTEENTH.—That Complainant is the owner of the Trade Mark or Trade Name “Oatmeal Crackers” as applied by Complainant to a carton of bakery products, and that Defendants have copied and simulated the same by the use of the words “Abetta Oatmeal Crackers” upon a carton in the same manner of display, and with the same coloring as upon Complainant’s cartons;

SIXTEENTH.—That Complainant is the owner of a Trade Mark, Animal Box, identified by the Pleadings and Proofs as Complainant’s Animal Box, and that the Defendants have copied and infringed Complainant’s rights therein by a complete simulation and copying thereof;

SEVENTEENTH.—That the bundle package containing Complainant’s carton formation enclosed for shipment and containing a red paster or label thereon, was originated by the Complainant, and copied by the Defendants;

EIGHTEENTH.—It is further ordered, adjudged and decreed that an injunction be issued against the said Defendants, corporation and individual, restraining them and each of them, their servants, agents, attorneys or employees from putting up and selling or offering for sale:

(a) Any carton of bakery product having thereon an imitation of Complainant's "In-er-seal" or red end seal Trade-Mark calculated to mislead or deceive, like Defendants' "Swastika" or red end seal or trade-mark.

(b) Any carton of bakery products having thereon an imitation of Complainant's "Uneeda Biscuit" trade-name, calculated to mislead or deceive, like those on Defendants' carton "Abetta Biscuit."

(c) Any carton of bakery products having thereon an imitation of Complainant's trade-names "Uneeda Milk Biscuit," "Oysterettes," "Marshmallow Dainties," "Cocoanut Dainties," and "Oatmeal Crackers," calculated to mislead or deceive, like those on Defendants' cartons respectively "Abetta Milk Biscuit," "Toke Point Oysterettes," "Marshmallow Dainties," "Cocoanut Dainties" and "Abetta Oatmeal Crackers."

(d) The particular forms of cartons or packages referred to in the bill of complaint and identified therein as "Complainant's Exhibit Defendants' Abetta Biscuit and Red End Seal Carton No. 2," and "Complainant's Exhibit Defendants' Infringing Packages Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16, respectively, or any other packages which shall by reason of the collocation of size, shape, colors, lettering, spacing and ornamentation, present a general appearance as closely resembling Complainant's exhibits respectively referred to in the bill of complaint and marked as "Complainant's Exhibit Complainant's Cartons Trade-name Uneeda Biscuit Wrapper No. 2," and Complainant's Exhibit Complainant's Cartons Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16, as do the said Defendants' respective infringing packages aforementioned. But this shall not be construed to restrain the Defendants from selling such cartons with their asserted "Swastika" trade-mark thereon providing the trade-mark is so differentiated in gen-

eral appearance and application from the Complainant's trade-mark, that it is not calculated to deceive or mislead the ultimate ordinary purchaser and shall not be construed as restraining the Defendants from selling packages or cartons of the size, weight or shape of Complainant's packages, nor from using the respective colors as wrappers for such packages, provided such packages are so differentiated in general appearance from the said Complainant's respective packages, that they are not calculated to deceive the ultimate ordinary purchaser.

NINETEENTH.—And it is further ordered that the injunction herein provided for shall not be actually issued until the first day of January, 1915.

TWENTIETH.—It appearing to the Court that the Defendants have made settlement with and paid the Complainant an agreed counsel fee provided by Statute to be fixed by the Chancellor on final decree, this decree shall be entered for taxable costs only including Four Hundred and Fifty and 40/100 Dollars (\$450.40) paid to notaries and stenographers for taking and transcribing notes of testimony, and it is agreed that this decree is final without modification or appeal by either party therefrom. The prayer for accounting being denied.

“E. R. WALKER,
C.”

Approved

“VREDENBURGH, WALL & CAREY,”
Solicitors for Complainant.

“COLLINS & CORBIN,”
Solicitors for Defendants.



I, ROBERT H. McADAMS, Clerk of the Court of Chancery of the State of New Jersey, the same being a court of RECORD, DO HEREBY CERTIFY that the foregoing is a true copy of the Decree, filed Sept. 30, 1914, in a cause wherein The National Biscuit Company is complainant and The Pacific Coast Biscuit Company, *et als.*, are defendants, now on the files of my office.

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the seal of said court, at Trenton, this thirtieth day of September, A. D. Nineteen hundred and fourteen.

ROBERT H. McADAMS,
Clerk.

NEW JERSEY, SS.

THE STATE OF NEW JERSEY TO THE PACIFIC
COAST BISCUIT COMPANY, CHARLES M.
WARNER, JOHN C. HANRAHAN, WILLIAM M.
LAWS, HERMAN WITTENBERG, MORITZ
THOMSEN, CHARLES HOTCHKISS and A. M.
BROOKES, OFFICERS AND DIRECTORS OF
SAID PACIFIC COAST BISCUIT COMPANY,
THEIR COUNSEL, ATTORNEYS, SOLICITORS
AND AGENTS, AND EACH OF THEM,
GREETING:

WHEREAS, by a certain final decree made in our
Court of Chancery of New Jersey, on the thirtieth day
of September, 1914, in a certain cause therein depend-
ing, wherein NATIONAL BISCUIT COMPANY, a cor-
poration of the State of New Jersey, is Complainant, and
PACIFIC COAST BISCUIT COMPANY, a corporation
of the State of New Jersey, and CHARLES M. WAR-
NER, JOHN C. HANRAHAN, WILLIAM M. LAWS,
HERMAN WITTENBERG, MORITZ THOMSEN,
CHARLES HOTCHKISS and A. M. BROOKES,
Officers and Directors of Pacific Coast Biscuit Company,
are Defendants, it was ordered, adjudged and decreed,

FIRST.—That the red end seal, known as the “In-er-
seal,” appearing upon the various carton bakery products
of the Complainant, with white line markings thereon, is
a good and valid Trade-Mark and the property of the
Complainant, and that the red end seal appearing upon
the ends of the carton products of Defendants, is an
infringement upon the Complainant’s red end seal;

SECOND.—That the Complainant’s Trade Name or
Trade-Mark “Unecda” is a good and valid trade-mark

and name, and the property of the Complainant, and that Defendants' name or mark "Abetta" Biscuit, with its placement upon Defendants' carton, is an infringement of said Complainant's name or mark herein;

THIRD.—That Complainant's trade-mark or trade name "Nabisco" is the mark or name of the Complainant, and that Defendants' carton or package, with the words "Parfait" and "Fiesta" in the same manner of display, are infringements of Complainant's trade-mark or name "Nabisco" as applied, by the simulation therewith of the color scheme of the wrappers thereof;

FOURTH.—That the name, mark or words "Social Tea" Biscuit as applied by the Complainant upon cartons of crackers, is the property of said Complainant, together with the decoration and appearance of said package, and that the Defendants' carton or package "Elite" Biscuit is a simulation and copying of said name or word designation in the same manner of display, of Complainant's on said package;

FIFTH.—That Complainant's trade-name, mark or term "Uneda Milk Biscuit", and the decoration and marking on Complainant's carton of biscuit products is the trade-mark and trade name property of Complainant, and Defendants have markedly infringed the same by copying such carton in connection with the name "Abetta Milk Biscuit" in the same manner of display as Complainant's carton;

SIXTH.—That the word, term or name "Oysterettes" is the trade-mark or trade name property of the Complainant, and the Defendants have infringed and copied the same in the same manner of display as Complainant's carton;

SEVENTH.—That the Complainant is the owner of the trade-mark or trade name “Fig Newtons” as applied to bakery products and cartons containing bakery products, and that the Defendants have manifestly copied the same by the use of the word “Fig Sultana” and the copying of the carton embellishment or decoration, in the same manner of display, in connection with Complainant’s trade-name or mark “Fig Newtons” upon their carton;

EIGHTH.—That the Complainant is the owner of the trade-mark or trade name “Marshmallow Dainties” as applied to its carton bakery products, and that the Defendants have infringed and copied the same by the use thereof, upon their cartons of bakery products, in the same manner of display;

NINTH.—That the Complainant is the owner of the trade-name “Zu Zu” as applied to bakery products and cartons of bakery products, and that the Defendants have simulated and copied the same, by the use of the words “Hoo Hoo” upon their Ginger Snap carton, in the same manner of display and having the same general appearance;

TENTH.—That Complainant is the owner of the trade name or trade-mark “Frotana” as applied to bakery products and cartons containing bakery products, and that Defendants have copied and infringed the same by the use of the word “Maritana” upon cartons of bakery products of similar size, color and decoration in the same manner of display as Complainant’s cartons;

ELEVENTH.—That Complainant is the owner of the trade-mark or trade name “Cocoanut Dainties” as applied to bakery products and cartons containing bakery

products and that the Defendants have violated and infringed the same by the use and application of the said trade-mark or trade name "Cocoanut Dainties" to cartons of bakery products, in the same size, general appearance of lettering and coloring, and in the same manner of display as Complainant's cartons;

TWELFTH.—That the Complainant is the owner of the trade-mark or trade name "Old Time Sugar Cookies" as applied to bakery products and the cartons containing bakery products, and that the Defendants have violated, infringed and copied the same by the use of the word or name "Old Fashioned Sugar Cookies" upon cartons of the same size and shape and white coloring, and in the same manner of display of the Complainant;

THIRTEENTH.—That the Complainant is the owner of the words, name or term "Celebrated Zwieback" as applied by them to cartons of bakery products, and that the Defendants have copied and infringed the same by the use of the words "Genuine Zwieback" on packages of substantially the same size and in the same printing and manner of display as appears upon Complainant's cartons;

FOURTEENTH.—That the Complainant is the owner of the trade-mark or name or designation "Fancy Assortment" as applied to cartons containing bakery products; that Defendants have copied and infringed the same by the use of the word or name "Fancy Assorted Cakes" upon cartons of the same size and prominent dress appearance and in the same manner of display as Complainant's cartons;

FIFTEENTH.—That Complainant is the owner of the trade-mark or trade name "Oatmeal Crackers" as ap-

plied by Complainant to a carton of bakery products, and that Defendants have copied and simulated the same by the use of the words "Abetta Oatmeal Crackers" upon a carton in the same manner of display, and with the same coloring as upon Complainant's cartons;

SIXTEENTH.—That Complainant is the owner of a trade-mark, Animal Box, identified by the pleadings and proofs as Complainant's Animal Box, and that the Defendants have copied and infringed Complainant's rights therein by a complete simulation and copying thereof;

SEVENTEENTH.—That the bundle package containing Complainant's carton formation enclosed for shipment and containing a red paster or label thereon, was originated by the Complainant, and copied by the Defendants;

EIGHTEENTH.—It is further ordered, adjudged and decreed that an injunction be issued against the said Defendants' corporation and individuals, restraining them and each of them, their servants, agents, attorneys or employees from putting up and selling or offering for sale:

(a) Any carton of bakery product having thereon an imitation of Complainant's "In-er-seal" or red end seal trade-mark calculated to mislead or deceive, like Defendants' "Swastika" or red end seal or trade-mark.

(b) Any carton of bakery products having thereon an imitation of Complainant's "Uneeda Biscuit" trade name, calculated to mislead or deceive, like those on Defendants' carton "Abetta Biscuit".

(c) Any carton of bakery products having thereon an imitation of Complainant's trade names "Uneeda Milk Biscuit," "Oysterettes," "Marshmallow Dainties,"

“Cocoanut Dainties,” and “Oatmeal Crackers,” calculated to mislead or deceive, like those on Defendants’ cartons respectively “Abetta Milk Biscuit,” “Toke Point Oysterettes,” “Marshmallow Dainties,” “Cocoanut Dainties” and “Abetta Oatmeal Crackers.”

(d) The particular forms of cartons or packages referred to in the bill of complaint and identified therein as “Complainant’s Exhibit Defendants’ Abetta Biscuit and Red End Seal Carton No. 2” and “Complainant’s Exhibit Defendants’ Infringing Packages Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16, respectively,” or any other packages which shall by reason of the collocation of size, shape, colors, lettering, spacing and ornamentation, present a general appearance as closely resembling Complainant’s exhibits respectively referred to in the bill of complaint and marked as “Complainant’s Exhibit Complainant’s Cartons Trade Name Uneeda Biscuit Wrapper No. 2” and Complainant’s Exhibit Complainant’s Cartons Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16, as do the said Defendants’ respective infringing packages aforementioned. But this shall not be construed to restrain the Defendants from selling such cartons with their asserted “Swastika” trade-mark thereon providing the trade-mark is so differentiated in general appearance and application from the Complainant’s trade-mark that it is not calculated to deceive or mislead the ultimate ordinary purchaser and shall not be construed as restraining the Defendants from selling packages or cartons of the size, weight or shape of Complainant’s packages, nor from using the respective colors as wrappers for such packages, provided such packages are so differentiated in general appearance from the said Complainant’s respective packages, that they are not calculated to deceive the ultimate ordinary purchaser.

And it was further ordered, adjudged and decreed

that an injunction do issue out of this court accordingly.

WE THEREFORE, ON CONSIDERATION OF THE PREMISES, do hereby strictly enjoin and command you, the said PACIFIC COAST BISCUIT COMPANY, CHARLES M. WARNER, JOHN C. HANRAHAN, WILLIAM M. LAWS, HERMAN WITTENBERG, MORITZ THOMSEN, CHARLES HOTCHKISS and A. M. BROOKES, Officers and Directors of Pacific Coast Biscuit Company, your counsel, attorneys, solicitors and agents, and each of you, under the penalty that may fall thereon, that you and each of you from henceforth and forever, do absolutely desist and refrain from imitating or simulating any of the Trade-Marks or Trade Names above identified, or manufacturing or selling or handling cartons of bakery products having thereon any imitation of the respective Trade-Marks and Trade Names above identified, and from putting up or offering for sale the particular forms of cartons or packages above identified or any other forms of packages or cartons respectively which shall, by reason of collocation of size, shape, colors, lettering, spacing or ornamentation present a general appearance resembling Complainant's several and respective cartons and packages identified and referred to in the bill of complaint and identified by the decree herein, and from the bundling of such cartons or packages in the manner, color, size and shape as shown by the respective exhibits herein.

WITNESS Honorable Edwin Robert Walker, our Chancellor, at Trenton this sixteenth day of January, in the year of our Lord One thousand nine hundred and fifteen.

ROBERT H. McADAMS,
Clerk.

VREDENBURGH, WALL & CAREY,
Solicitors for Complainant.



I, ROBERT H. McADAMS, Clerk of the Court of Chancery of the State of New Jersey, the same being a Court of Record, do hereby certify that the foregoing is a true copy of the Writ of Injunction, in the cause wherein National Biscuit Company is Complainant and Pacific Coast Biscuit Company, *et als.*, are Defendants, now on the files of my office.

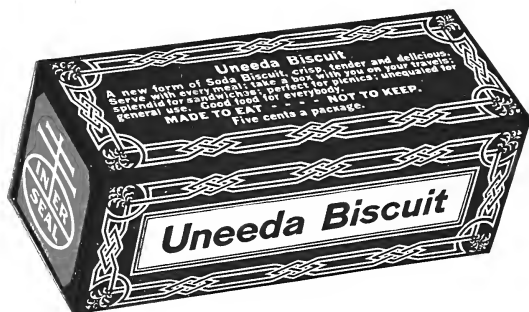
In Testimony Whereof, I have hereto set my hand and affixed the seal of said Court, at Trenton, this Sixteenth day of January, A. D. Nineteen hundred and fifteen.

ROBT. H. McADAMS,
Clerk.

Service of the within Injunction is hereby acknowledged for the Defendants this 18th day of January, 1915.

COLLINS & CORBIN,
Solicitors for Defendants.









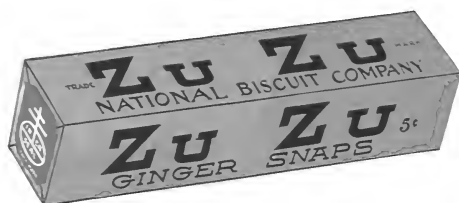






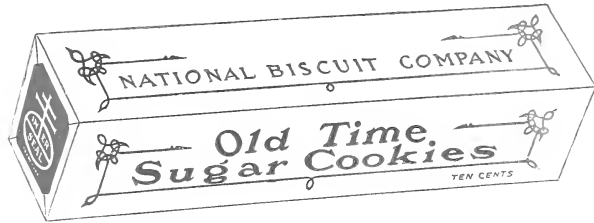










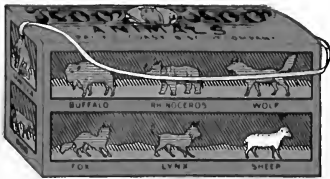
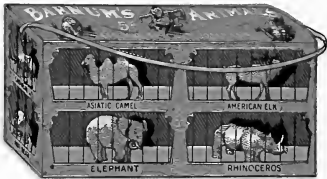


NATIONAL BISCUIT COMPANY *vs.*
PACIFIC COAST BISCUIT COMPANY

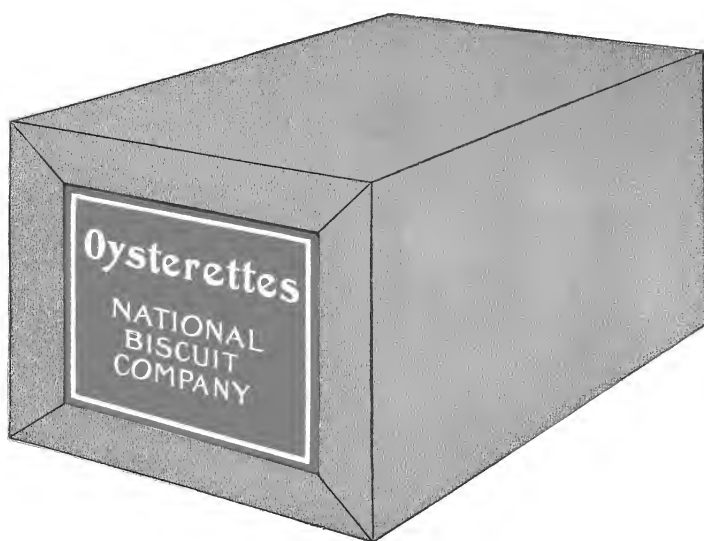














TABLES OF INFRINGEMENTS

In addition to the foregoing, the following tables show infringements of trade marks, trade names, labels, and the equitable rights of National Biscuit Company therein as abandoned by two hundred and eighty-eight manufacturers under notice, but without suit.

NATIONAL BISCUIT COMPANY

R. E. TOMLINSON

Counsel

New York,

February 1915

ABANDONMENTS AS OF JANUARY, 1906

(Third Edition)

In-er-seal Trade Mark.....	58
Uneeda Biscuit	29
Red Label Graham.....	27
Ribbon Tying Design.....	22
Mary Ann	22
Social Tea	13
Zu Zu	11
Lemon Snaps label.....	6
Oysterettes	6
Jonnie	4
Faust	4
Saratoga Flakes label, Tid Bit, City Soda label, Premium Biscuit, Saltine label, Etc., Etc.....	47
Total.....	249

ABANDONMENTS AS OF JANUARY, 1907

(Fourth Edition)

In-er-seal Trade Mark....	80
Unedda Biscuit	35
Red Label Graham.....	31
Ribbon Tying Design.....	26
Mary Ann	28
Social Tea	15
Zu Zu	11
Lemon Snaps label.....	8
Oysterettes	10
Jonnie.....	4
Faust	9
Refillers of Cans and Boxes.....	12
Saratoga Flakes label, Nabisco, City Soda label, Premium Biscuit, London Cream Biscuit, Saltine label, Oatmeal Crackers label, Tid Bit, Eagle, Etc., Etc., Etc.....	61
Total.....	330

ABANDONMENTS AS OF JANUARY, 1915

(Fifth Edition)

In-er-seal Trade-Mark	145
Uneeda Biscuit	58
Red Label Graham.....	48
Ribbon Tying Design.....	35
Mary Ann	37
Social Tea	35
Zu Zu	18
Lemon Snaps label.....	13
Oysterettes	19
Jonnie	8
Faust	10
Saratoga Flakes	12
Oatmeal Crackers label.....	9
Eagle	8
Royal	21
Five O'Clock	13
Nabisco	10
Premium	10
Sorbetto	10
Cow Design	15
Fig Newtons	10
Dainties	10
Tid-Bit	10
Refillers of Cans and Boxes.....	72
American Beauty, Crispy, Champion Cameo, Festino, Golden Rod, Kream Klips, Picnic, Pretzelettes, Old Time, Shell, Star, Sea Foam, Taffy, etc., etc.....	197
Total.....	833

SUMMARY OF ABANDONMENTS BY YEARS

	1905	1906	1907	1908	1909	1910	1911	1912	1913	1914
In-er-seal Trade Mark..	58	80	96	108	120	128	133	134	137	145
Uneeda Biscuit	29	35	37	39	42	45	49	51	52	58
Red Label Graham....	27	31	35	41	42	42	42	43	43	48
Ribbon Design	22	26	29	29	29	29	29	29	29	35
Mary Ann	22	28	29	30	30	32	33	35	35	37
Social Tea.....	13	15	17	21	24	24	28	29	31	35
Zu Zu	11	11	12	13	13	13	13	14	15	18
Lemon Snaps Label....	6	8	9	12	12	13	13	13	13	13
Oysterettes	6	10	11	12	12	13	15	15	15	19
Jonnie	4	4	4	6	7	7	7	8	8	8
Faust	4	9	10	10	10	10	10	10	10	10
Saratoga Flakes	3	3	6	6	9	10	10	12	12	12
Oatmeal Crackers Label	1	3	5	6	6	7	7	7	7	9
Eagle	—	4	4	5	6	8	8	8	8	8
Royal	2	2	5	6	7	10	12	15	16	21
Five O'Clock	—	—	3	5	5	6	8	10	11	13
Nabisco	—	2	3	3	5	5	8	8	8	10
Premium	—	2	3	6	6	8	9	9	9	10
Sorbetto	—	—	3	3	5	10	10	10	10	10
Cow Design	—	—	3	5	8	12	12	12	13	15
Fig Newtons	—	—	—	—	1	2	3	4	5	10
Dainties	—	—	—	—	1	2	2	2	2	10
Tid-Bit	3	3	3	3	3	3	3	3	6	10
Refillers of Cans and Boxes	2	12	14	26	30	37	55	63	69	72
American Beauty, Crispy, Champion, C a m e o, Festino, Golden Rod, Kream Klips, Picnic, Pretzelettes, Old Time, Shell, Star, Sea Foam, Taffy, etc., etc.....	36	42	57	77	81	90	93	100	110	197
Total by Notice.....	249	330	398	472	514	566	612	644	674	833
By Injunction	19	32	32	32	32	32	32	32	32	49
	268	362	430	504	546	598	644	676	706	882







LIBRARY OF CONGRESS



00027500298